INDEX

Subject Index

	Page
Preliminary statement	1
Statement of the case	2
Statutory provision sustaining jurisdiction	8
Statutes of the State involved	8
Date of judgment and application for appeal	10
Cases believed to sustain the jurisdiction	11
Raising the Federal questions and rulings thereon by the courts below	12
Statement of grounds upon which it is contended that the questions involved are substantial	19
A. The alienable, proprietary, beneficial rights and uses in and to said 33 acres were duly vested in appellants and their predecessors by the various conveyances to them made prior to said 1909 and 1917 statutes and under the established law in Minnesota with respect thereto	20
B. The 1909 and 1917 Statutes and said Final Judgment giving effect thereto are in conflict with Article I, Section 10 of the United States Constitution and Section 1 of the Fourteenth Amendment thereto	29
C. Practical substance and importance of constitutional question	31
D. Constitutional question cannot be avoided where it exists in substance	33
Appendix A—Early Minnesota Statutes and Decisions in Connection Therewith	39
Appendix B—Minnesota Supreme Court's Opinion	44
Appendix C—Opinion of the District Court accompanying its original findings of fact and conclusions of law, dated April 8, 1946	51
Appendix D—Opinion of the District Court accompanying its order amending its orginal findings of	

Page

fact and conclusions of law, on motion by the various parties to the cause, dated July 12, 1946 60
Appendix E—Original Opinion of the Supreme Court of Minnesota, dated August 8, 1947 63
Appendix F—Order and Opinion of the Supreme Court of Minnesota denying petition for reargument and making certain changes in the original opinion, dated December 5, 1947 90
Appendix G—Second Opinion of the Supreme Court of Minnesota Rendered in Connection with Appellants' Second Appeal, dated December 24, 1948 91

CASES CITED

Appleby v. *Delaney*, 271 U. S. 403 ..... 12, 20, 30
Appleby v. *New York*, 271 U. S. 364 ..... 11, 20, 29, 34
Aris v. *First National Bank*, 162 S. W. 2d 1072 32
Atlantic Coast Line R. R. Co. v. *Phillips*, 332 U. S. 168 12
Bank of Minden v. *Clement*, 256 U. S. 126 29
Barney v. *Keokuk*, 94 U. S. 324 ..... 46, 47
Beaupre v. *Noyes*, 138 U. S. 402 11
Bradshaw v. *Duluth Imperial Mill Co.*, 52 Minn. 59, 20, 23, 27
Brisbine v. *Railroad Co.*, 23 Minn. 114 ..... 22, 27
Butler Brothers v. *McColgan*, 315 U. S. 501 12
Chicago, Burlington & Quincy R. R. Co. v. *Chicago*, 166 U. S. 226 ..... 11, 29
Columbia Ry. v. *South Carolina*, 261 U. S. 236 ..... 12, 34
Coolidge v. *Long*, 282 U. S. 582 ..... 12, 20, 30, 34
Dobbins v. *Los Angeles*, 195 U. S. 223 30
Everson v. *Board of Education*, 330 U. S. 1 12
Fletcher v. *Peck*, 6 Cr. 87 20
Fox Film Corp. v. *Muller*, 192 Minn. 212, 255 N. W. 845, 293 U. S. 550, 294 U. S. 696, 194 Minn. 654, 260 N. W. 300, 296 U. S. 207 11
Gilbert v. *Eldridge*, 47 Minn. 210 ..... 23, 27
Greenough v. *Tax Assessors of Newport*, 331 U. S. 486 12
Hanford v. *St. Paul & Duluth R. R.*, 43 Min. 104 20, 23, 25, 27
Hardin v. *Jordan*, 140 U. S. 371 ..... 20, 45, 46, 47

BLEED THROUGH – POOR COPY

Page
Higgins Oil & Fuel Co. v. *Snow*, 113 F. 433 32
Hill v. *Sumner*, 132 U. S. 118 29
Hobart v. *Hall*, 174 F. 433, affirmed 186 F. 426 25
Houston & Central R. R. v. *Texas*, 177 U. S. 66 ..... 12, 34
In re Petition of Shaller, 193 Minn. 604 32
Kaukauna Water Power Co. v. *Green Bay & Mississippi Canal Co.*, 142 U. S. 254 ..... 21, 46, 47
Lamprey v. *State*, 52 Minn. 181 ..... 23, 24, 27, 42
Lawrence v. *State Tax Commission*, 286 U. S. 276 ..... 11, 34
Louisiana v. *New Orleans*, 102 U. S. 203 29
Louisiana Railway & Navigation Co. v. *New Orleans*, 235 U. S. 164 ..... 11, 34
McCullough v. *Virginia*, 172 U. S. 102 34
McGilvra v. *Ross*, 215 U. S. 70 46
Merchants National Bank v. *First National Bank*, 238 F. 502 29
Meyers v. *Lafayette Club*, 197 Minn. 241 32
Miller v. *Mendenhall*, 43 Minn. 95 ..... 22, 24, 27
Mobile & Ohio R. R. v. *Tennessee*, 153 U. S. 486 34
Muhlker v. *Harlem R. R. Co.*, 197 U. S. 544 ..... 12, 30
National Life Insurance Co. v. *Schaffer*, 131 U. S. cciii 11
Nelson v. *DeLong*, 213 Minn. 425 ..... 23, 32
Oklahoma v. *Texas*, 258 U. S. 574 21
Oliver Iron Co. v. *Lord*, 262 U. S. 172 28
Packer v. *Bird*, 137 U. S. 661 ..... 46, 47
Pennsylvania Coal Co. v. *Mahon*, 260 U. S. 393 ..... 20, 30
Phelps v. *Harris*, 101 U. S. 370 29
Pollard's Lessee v. *Hagan*, 3 How. 212 45
Railroad Commission v. *Eastern Texas R. Co.*, 264 U. S. 79 34
Rooney v. *County of Stearns*, 130 Minn. 176 ..... 28, 43
St. Anthony Falls Water Power Co. v. *Board of Water Commissioners*, 168 U. S. 349 ..... 21, 46, 47
St. Louis v. *Rutz*, 138 U. S. 226 ..... 21, 47
Scott v. *Lattig*, 227 U. S. 229 ..... 45, 47
Schurmeier v. *St. Paul & Pacific R. R. Co.*, 10 Minn. 59, affirmed 74 U. S. 272 22
Shell v. *Matteson*, 81 Minn. 38 50
Shively v. *Bowlby*, 152 U. S. 1 ..... 21, 45, 46

Page

Siebert v. *Lewis*, 122 U. S. 284 29
Standard Oil Company v. *Johnson*, 316 U. S. 481 12
Stanton v. *Baltic Mining Co.*, 240 U. S. 103 28
State ex rel. County of Jackson v. *District Court*, 146 Minn. 150 32
State v. *Korrer*, 127 Minn. 60 ..... 23, 25, 27, 28, 42
Terre Haute & Indianapolis R. R. v. *Indiana*, 194 U. S. 579 ..... 12, 34
Union Depot v. *Brunswick*, 31 Minn. 297 ..... 22, 27
United States v. *California*, 332 U. S. 19 45
United States v. *Gratiot*, 39 U. S. 526 29
United States v. *Holt State Bank*, 270 U. S. 49 ... 28, 43, 48
United States v. *Oregon*, 295 U. S. 1 20
United States v. *Utah*, 283 U. S. 64 20
Ward v. *Love County*, 253 U. S. 17 ..... 11, 34

STATUTES CITED

Chapter 257, Minnesota Laws of 1897 ..... 28, 39
Chapter 230, Minnesota Laws of 1905 42
Chapter 49, Minnesota Laws of 1909 ..... 8, 9, 13, 16
Chapter 384, Minnesota Laws of 1911 42
Section 5481, Minnesota General Statutes of 1913 43
Chapter 110, Minnesota Laws of 1917 ..... 10, 16

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IN SUPREME COURT, STATE OF MINNESOTA, 1949

No. 34772

STATE OF MINNESOTA,

Respondent,

vs.

LONGYEAR HOLDING COMPANY, A CORPORATION, ET. AL.,

Defendants

LONGYEAR HOLDING COMPANY, A CORPORATION, HELEN H. BENNETT, C. M. HILL LUMBER COMPANY, A CORPORATION, THE ADAMS CORPORATION, A CORPORATION, HAROLD W. McCORMACK, JOHN ANDREW PETERSON, FANNIE E. DANIELS, ANNIE E. DANIELS, MINNIE DANIELS MANN, JENNIE D. CAMP, ANN R. HESS, WILLIAM R. DANIELS, LANCAS IRON COMPANY, A CORPORATION, THE NORTH STAR IRON COMPANY OF WEST VIRGINIA, A CORPORATION, SAGINAW LAND COMPANY, A CORPORATION, HELEN EMERSON JAMISON, FRANCES SELLWOOD LUSTER, R. M. SELLWOOD, JR., AND JOSEPH GERALD SELLWOOD,

Appellants

STATEMENT AS TO JURISDICTION

Preliminary Statement

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, appellants herein respect-

fully submit this statement showing the grounds upon which they contend that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment of the Supreme Court of the State of Minnesota made and entered in the above entitled cause on December 24, 1948.

Statement of the Case

This case involves the ownership of the alienable, proprietary, beneficial rights and uses in some 33 acres of land in St. Louis County, Minnesota, which had formerly been the bed of a small shallow body of water known as "Syracuse Lake".

The owners of the lots, in the section where the lake had been, conceded to the State the inalienable governmental rights in and powers over the public waters and their beds for common public use for the purposes for which the waters were adapted, but claimed the alienable, proprietary, beneficial rights and uses in such lands. (R. pp. 17-19, 21-22, 23-25, 27-28, 30-31, 33-34, 36-39). The State claimed the full exclusive fee simple title. (R. pp. 2-3). The judgment appealed from held for the State with respect only to the ores and minerals in such land (which had been appropriated by the State by Acts of its legislature in 1909 and 1917) and declined to confirm the State's claim in other respects. (R. pp. 322-323, 356-364.)

Such lake had lain in the middle of (and been characterized by the State Conservation Commission, in authorizing its diversion, as merely a "widening" of), a boulder strewn stream about 5100 feet long which had connected the southerly end of a larger lake lying to the north known as "Wine Lake" with the easterly end of a lake lying to the south known as "Embarrass Lake". (R. pp. 301-302, 270, 290). A body of some 20,000,000 tons of iron ore had been discovered in this area lying about 150 to 200 feet below

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the surface of the land and in such location that some 2,400,000 tons of it lay beneath where a part of the shallow waters of Syracuse Lake had once covered the land. (R. p. 273).

Some time prior to the commencement of this action parties *other than appellants* had, under the authority of the State duly given, and with the approval of the Federal Government:

(a) diverted the waters, which had formerly flowed through Syracuse Lake and its connecting channels, into a new water course which had been excavated directly between Wine Lake and Embarrass Lake and which had been duly conveyed to the State and dedicated to public use pursuant to appropriate *findings by State authority that such diversion would "greatly facilitate navigation" of such waters;* (R. pp. 275-276, 253-254), Defendant Lake Mining Company's Exhibit No. 1. (R. pp. 50a to 50i.)

(b) stripped and removed the surface overlying a substantial part of the ore body, and including that which had been part of the lake bed; (R. pp. 280-281).

(c) filled with stripping the lower part of Wine Lake, the connecting channels around Syracuse Lake and parts of the former bed of Syracuse Lake which were not stripped for the mine; (R. p. 299) and

(d) shipped from the mine large tonnages of iron ore. (R. pp. 291)

Appellants are the admitted owners of all of the lots in the area in which such former lake had been located (R. pp. 309-310), and had each, at various times from 1903 on (R. pp. 262 and 257 et seq.), leased for the mining of iron ore, their respective lots including their respective portions of the lake bed appurtenant to their lots. Such leases at the time of the commencement of this action were held

by defendant Lake Mining Company (R. pp. 257-265).

Lake Mining Company also held a mining lease from the State of Minnesota, given pursuant to Minnesota Laws of 1917, Chapter 110, covering:

> "that portion of lots five and six of section five and that portion of lots nine, ten, eleven and twelve of section six, all in township fifty-eight north, of range fifteen west, constituting the bed of Syracuse Lake." (R. p. 5).

Such lots are the lots which admittedly belong to appellants. Such lots were originally conveyed to appellants' predecessors in title by patents issued by the United States Government in the years 1884 to 1896; and it was stipulated that appellants, through various deeds and conveyances, are the successors in interest to the original patentees (R. pp. 309-311).

Such State lease provided for the periodic payment of royalties "for all the iron ore *belonging* * to said State" mined and shipped during the period; that such royalties should be paid into escrow until ownership of the ore was finally determined; and that if the owners were some one other than the State, lessee's obligation to pay royalties should cease but the lease might be continued for a $500 per year rental for the "use of such rights, easements and privileges as the State may have in said premises and the waters thereon" (R. pp. 5-11).

The findings and orders of the State Commissioner of Conservation, given pursuant to Minnesota Laws 1937, Chapter 468, under which the diversion of the waters, the filling of the old channels and the dedication of the new channel were carried out, appear in the record as Defendant Lake Mining Company's Exhibit Number 1, at pages 50a to 50i.

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* Emphasis throughout ours except as otherwise noted.

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The sovereign rights of the United States were likewise duly recognized and satisfied by securing from the War Department its permit for and authorization of the diversion of the waters and filling of the old channels. (War Department Permit, Defendant Lake Mining Company's Exhibit No. 2, R. pp. 50i to 50m.)

Some time after the waters had been thus duly diverted, the new channel dedicated, the old channels filled and the mine developed and shipping ore, the State filed its complaint in the 11th District Court of Minnesota on September 11, 1944, naming appellants and Lake Mining Company as defendants and alleging and seeking judgment that it *"is the owner in fee simple"* of said 33 acres of land which had formerly been the bed of such lake and is "the sole owner of all iron ores and other minerals on, in and under said lands * * *" with the right *"to sell, lease, or otherwise use or dispose of such lands and such iron ores or other minerals* * * * and that defendants and none of them have any estate in or interest in" such lands, ore and minerals (R. pp. 1-4).

Appellants answered, in generally similar form, setting up their respective ownerships by various conveyances stemming from original patents issued by the United States in 1883 to 1896 in the various lots involved and "including the sole proprietary ownership of that portion" of the former lake bed properly tributary to their lots, "subject only to such sovereign rights as exist in the State of Minnesota to regulate the waters of said lake and the use thereof"; and setting up the mining leases given by them thereon; and alleging that their such respective rights, title and interest were vested rights under the Constitution and laws of the United States and of the State of Minnesota, and that any statute or decision of the State purporting to vest any proprietary title or interest in the State or to

deny such rights and interests to the defendants was invalid and a taking of the property of the defendants in violation of the Constitution and laws of the United States and of the State of Minnesota (R. pp. 16-39).

At the trial and in the briefs:

(a) The State, while claiming that it has always owned all of the alienable, proprietary, beneficial rights and uses as well as its conceded governmental rights, stressed particularly its claim to the iron ores and minerals and its right to lease the same as appropriated by its 1909 and 1917 statutes herein more particularly described; and

(b) Appellants conceded to the State the inalienable, governmental rights over the public waters and their beds for their common public use for the purposes for which they were adapted, while maintaining that under the established law in Minnesota under which their titles had become vested, they had full ownership of the alienable, proprietary, beneficial rights and uses and that such statutory appropriation of the proprietary rights and uses in the ores and minerals was unconstitutional.

The issue presented was therefore as to:

(1) The ownership of the alienable, proprietary, beneficial rights and uses in the 33 acres of land then constituting part of the mine and stripping dumps; and

(2) The constitutional validity of said Minnesota statutes by which the State had sought to appropriate such rights in and to the ores and minerals in such land.

The District Court's original findings (R. pp. 316-323) envisioned the waters still in place and concluded that the State held the lake and bed "in its sovereign, governmental capacity, for common public use and in trust for the people of the State for the public purposes for which it is

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adapted, but not in absolute proprietorship with right of alienation"; and then held (in line with such 1909 and 1917 statutes) that the State owned "all iron ores and other mineral on, in or under said lands * * * with the right to dispose of same by lease" subject to the lease therefor granted by it pursuant to the 1917 statute "and that none of the defendants are entitled to receive or be paid any royalties or other compensation *for any of such ore.*"

On defendants' motions for amended findings, etc. (R. pp. 358-363) the District Court corrected its findings to show the facts above indicated, namely, that prior to the commencement of the case Syracuse Lake had "ceased to exist"; (R. p. 361) that under due authority of the State the waters had been diverted to another duly dedicated bed and channel, etc., (R. pp. 361-362); but declined to change its conclusion that the State had full proprietary ownership of the ores and minerals with the right to lease same and that defendants did not.

The State moved to amend the conclusion:

> (a) to expressly approve the validity of the mining lease issued by the State pursuant to the 1917 Act; and
>
> (b) to exclude the riparian owners from any interest whatsoever in the lake bed (as against denying to them only the proprietary and royalty rights in the ores and minerals).

The District Court granted the State's first request in line with the 1917 Act but denied the second request and declined to exclude the shore owners from proprietary rights and uses in anything other than the iron ore and minerals (which had been appropriated by said statutes).

Thus, the final decision of the District Court, which is the foundation of the appeal here

> (a) sustains as in the State the conceded inalienable, governmental rights and also the alienable, proprietary

rights in *only the iron ore and minerals sought to be appropriated to the State by its 1909 and 1917 statutes,* and

(b) denied to the lot owners *only that part of their alienable, proprietary, beneficial rights and uses which involved the iron ores and minerals so appropriated by such statutes.* (R. pp. 322-323; 359-363; 364).

Appellants appealed to the Supreme Court of Minnesota from such findings and order for judgment thereon of the District Court, again raising by their assignment of errors (R. p. 368) the Federal Constitutional questions involved. On August 8, 1947, the Supreme Court of Minnesota affirmed said order of the lower court; appellants duly filed a motion for reargument which was denied on December 5, 1947, with correction of certain errors in the Minnesota Supreme Court's original opinion; judgment was entered in the District Court on April 13, 1948; appeal from said judgment was duly filed in the Supreme Court of Minnesota on May 16, 1948, again raising and urging the Federal Constitutional questions involved; and on December 24, 1948, such judgment of the District Court was affirmed by the Minnesota Supreme Court. It is from such final judgment that this appeal is sought.

Statutory Provision Sustaining Jurisdiction

The statutory provision believed to sustain the jurisdiction of this Court is Title 28, United States Code, Section 1257(2), as enacted effective September 1, 1948, by Public Law 773—80th Congress.

Statutes of the State Involved

Statutes of the State, the validity of which are involved, are Minnesota Laws of 1909, Chapter 49, and Minnesota Laws of 1917, Chapter 110.

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Minnesota Laws of 1909, Chapter 49, reads as follows:

"An Act relating to mineral and mineral lands lying beneath the waters of meandered public lakes. Declaring the ownership of the state therein, and providing for the safekeeping and investment of the funds arising from the sale, or other disposition thereof.

Be it enacted by the Legislature of the State of Minnesota

"State ownership in minerals under water of meandered public lakes asserted.

Section 1. That *all iron ores and other minerals* on, in or under the lands within this state which lie beneath the waters of meandered *public lakes and rivers belong to the state,* together with the right to enter upon such lands and explore for and mine and remove such iron ore and other minerals, and that the state now has, and since its organization has had, the right to sell, lease or otherwise use or dispose of such mineral lands and such iron ores and other minerals, in the same manner as any other mineral lands, ores, or minerals belonging to the state, and *that the title of the state to such iron ore or other minerals,* together with the right to explore for, mine or remove the same, *shall not be affected by the subsequent drying up of such lake or rivers."*

Section 2. Applications for mineral leases and contracts now pending and on file in the land department of the state auditor's office shall not be recognized as valid or existing by reason of anything contained in this Act."

(Section 3 provides that "The principal of all funds derived from the sale or other disposition of such minerals and lands so situate" shall be added to the Swamp Land fund.)

(Section 4 provides that the Act shall be in effect from the date of its passage—March 6, 1909).

Laws of 1917, Chapter 110, reads as follows:

"An Act to empower the governor, attorney general and state auditor, to enter into agreements with persons, co-partnerships and corporations for the purpose of mining and disposing of *iron ore situate under the waters of any public lake or river within the state of Minnesota,* and providing for the disposal of all funds arising from such sale or other purposes.

Be it enacted by the Legislature of the State of Minnesota:

"Section 1. *Contracts for removing ore from under lake beds at minimum royalty of 50 cents per ton.* The governor, attorney general and state auditor are hereby empowered to enter into contracts or agreements with persons, co-partnerships, or corporations for the mining and disposing of the *iron ore situate under any waters of any public lake or river in the state of Minnesota* * * *".

(This section further provides for a minimum royalty to the state of 50 cents per ton; for the drainage of any lake or river in order to mine, etc.)

(Section 2 provides that royalties arising from the disposal of such iron ore shall be added to the state school fund.)

(Section 3 provides that contracts or agreements for the disposal of iron ore shall be sold at public sale to the highest bidder on the basis of the royalty to the state).

(Section 4 provides that the Act shall be in effect from the date of its passage—March 26, 1917).

Date of Judgment and Application for Appeal

The District Court filed its findings of fact, conclusions of law and *order for* judgment on April 8, 1946; the appellants filed motions to amend the findings of fact and conclusions of law and alternative motions for a new trial and

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the State filed a motion to amend the conclusions of law and findings of fact; the District Court on July 12, 1946, denied in part the motions to amend the findings of fact and conclusions of law and denied the alternative motions of appellants for a new trial; appellants appealed from this order to the Supreme Court of Minnesota; that court affirmed the order on August 8, 1947; appellants filed a motion for reargument and such motion was denied on December 5, 1947. Judgment was entered in the District Court on April 13, 1948. This judgment was appealed to the Minnesota Supreme Court on May 16, 1948; and that court affirmed such judgment of the District Court on December 24, 1948, at which date the judgment of the Supreme Court affirming the judgment of the District Court became final.

National Life Insurance Co. v. *Scheffer,* 131 U. S. cciii;
Beaupre v. *Noyes,* 138 U. S. 402;
Fox Film Corp. v. *Muller,* 192 Minn. 212, 255 NW 845; 293 U. S. 550; 294 U. S. 696; 194 Minn. 654, 260 N.W. 300; 296 U. S. 207.

The petition for appeal was presented February 15, 1949.

Cases Believed to Sustain the Jurisdiction

The cases believed to sustain the jurisdiction of the Court are:

Louisiana Railway & Navigation Co. v. *New Orleans,* 235 U. S. 164, 170-171;
Ward v. *Love County,* 253 U. S. 17, 22;
Chicago, Burlington & Quincy RR Co. v. *Chicago,* 166 U. S. 226, 232, 236, 241;
Lawrence v. *State Tax Commission,* 286 U. S. 276, 282, 283;
Appleby v. *New York,* 271 U. S. 364, 380, 381, 391;

Appleby v. *Delaney*, 271 U. S. 403, 409, 414;
Houston & Central RR v. *Texas*, 177 U. S. 66, 77;
Terre Haute & Indianapolis RR v. *Indiana*, 194 U. S. 579, 589;
Columbia Ry. v. *South Carolina*, 261 U. S. 236, 244-247;
Muhlker v. *Harlem R. R. Co.* 197 U. S. 544, 570-571;
Coolidge v. *Long*, 282 U. S. 582, 597, 605-606;
Butler Brothers v. *McColgan*, 315 U. S. 501;
Standard Oil Co. v. *Johnson*, 316 U. S. 481;
Everson v. *Board of Education*, 330 U. S. 1;
Greenough v. *Tax Assessors of Newport*, 331 U. S. 486;
Atlantic Coast Line R.R. Co. v. *Phillips*, 332 U. S. 168.

Raising the Federal Questions and Rulings Thereon by the Courts Below

Appellants filed separate or joint answers to the complaint herein in the 11th District Court of Minnesota. (R. pp. 16-50). Each of said answers specifically raised the Federal Constitutional questions involved in this case by the following, or substantially the same, language, after setting up ownership by appellants of the proprietary rights and uses in the lands in question:

"These answering defendants for their separate answer to the complaint herein:

* * * * *

6. Allege that the right, title and interest so acquired by said patent, and the undivided interests therein which have so passed to these defendants were and are vested rights under the Constitution and laws of the United States and of the State of Minnesota; *that any statute of the State of Minnesota or any decision of the courts of said State purporting to vest in the State of Minnesota any proprietary title or interest in the lands* in paragraph 5 described, or to deny to these defendants the rights therein alleged in paragraph 5

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hereof, *is invalid as a deprivation of the property of these defendants without compensation and without due process of law in violation of the Constitution and laws of the United States and of the State of Minnesota.*" (R. pp. 18-19, 22, 25, 27-28, 31, 34, 38.)

Appellants stressed the Federal Constitutional question in their briefs in the District Court. The State relied on Minnesota Laws of 1909, Chapter 49, and Laws of 1917, Chapter 110, in that court, its brief therein quoting or digesting such statutes at pages 70 and 71 and among other arguments stating at page 162:

> "In the *Korrer* case no consideration was given by the court to Laws 1909, Chapter 49, declaring the title of all iron ores and other minerals on, in or under lands within this State lying beneath the waters of meandered public lakes and rivers to be in the State. *Upon that statute we very definitely do rely here as a legislative declaration of the law of this State with reference to the property of the State.*
>
> "After the decision in the *Korrer* case, as stated by Mr. Bade, there was enacted Laws 1917, Chapter 110, and there have been enacted since that time the various amendments to that statute to which attention has been called.
>
> "We have therefore, a situation in which the court in the *Korrer* case did not give consideration to statutes which are now before the court."

The District Court passed specifically on the validity of such statutes under the United States Constitution, entering judgment on the following amended conclusions of law and similar findings of fact:

> "That plaintiff is entitled to judgment that it is the owner of the bed, below low water mark, of said Syracuse Lake in its sovereign, governmental capacity, for common public use and in trust for the people

of the state for the public purposes for which it is adapted, but not in absolute proprietorship with right of alienation, and is such owner of all iron ores and other minerals on, in or under said lands, below low water mark, underlying Syracuse Lake, with right to dispose of same by lease, subject to the lease to John R. Vanderlip dated July 18, 1918, which it was *lawfully entitled to make*, and that none of the defendants are entitled to receive or be paid any royalties or other compensation for any of said ore". (R. pp. 322-3, 359-361)

Thus, as hereinafter more fully analyzed (pp. 34 to 37), such conclusion, and the formal judgment entered thereon, found to be in the State and denied to the lot owners alienable, proprietary, beneficial rights and uses in only the "iron ore and minerals" which had been appropriated to the State by its 1909 and 1917 statutes. Having thus followed and applied such statutes in its conclusion and judgment, the District Court necessarily, of course, sustained their validity.

In its Memorandum (opinion) accompanying its first findings of fact and conclusion of law, the District Court stated as follows:

(R. pp. 329-330) "*Until 1909 there was no legislative declaration of policy in Minnesota.* The courts had assumed to determine the question as it arose between private interests in controversies involving specific, concrete situations. * * *

(R. pp. 335-6) " * * * It seems to me that the purport of our court decisions is that the interest of the State in the beds of navigable waters is such that even though it does not own the submerged land in the sense of ordinary, absolute proprietorship with the right of alienation, it does have the right to contract for development of the resources contained in the submerged lands *in the manner provided for by Chapter 110, Laws 1917.*

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"That law provides for entering into contracts, by the governor, attorney general and auditor on behalf of the State, with private parties, for the mining and disposal of the iron ore situate under the waters of any public lake or river in the State, that such contracts may provide for the drainage of such lake or river or the diversion of the waters to new channels, and that the principal of all funds arising from the disposal of such iron ore shall be added to the permanent school fund of the State. *This implements the policy contained in Chap. 49, Laws of 1909,* in a manner designed to execute the trust under which the submerged lands are held *and negatives any right of the riparian owner to the minerals.*

"Assuming that the State, upon admission to the Union, became the owner of the beds of navigable or public waters, with power to control them as the proper state authority should deem best in the public interest, *I see no insuperable bar to the adoption of such policy as is contained in the 1909 and 1917 acts, unless it be private property rights which had become vested before the enactment of those laws.* Assuming that in the absence of legislative enactment the court had to declare what the law was, the previous judicial decisions *had not specifically upheld the riparian owner's right to take out minerals such as iron ore. If such right could be spelled out of those decisions it was only from general language attempting to define the relative rights of the State and the riparian owner.*"

In its supplemental memorandum opinion (R. p. 366) the District Court said:

"But I am influenced by the fact that controlling judicial decision seems to have established the rule that the state, upon admission to the Union, was empowered to establish what policy should be followed, and by the thought that *judicial decision prior thereto was not a bar to the action which the Minnesota legislature took in enacting the legislation in 1909 and 1917 which has heretofore been discussed.*

Thus the District Court passed directly on the validity of the 1909 and 1917 statutes, holding that they did not violate appellants' Federal Constitutional rights.

Upon the original appeal from the District Court, appellants filed the following assignment of error in the Supreme Court of Minnesota:

> "8. The Court erred in denying the motion of defendants—riparian owners for a new trial for the reason that the decision of the Court deprived said defendants of their property without due process of law in violation of the provisions of Article I, Section 7, of the Constitution of the State of Minnesota and in violation of the provisions of Article XIV, Section 1, of the Constitution of the United States" (App. Brf. p. 6).

The brief filed by appellants in the Supreme Court of Minnesota contained among other things the following (p. 84):

> "The decision of the District Court, by giving effect to Laws of 1909, Chapter 49, and Laws of 1917, Chapter 110, violates the Constitution of the United States by taking defendants' property without due process of law and by impairing defendants' obligations of contract."

The State's brief in the Supreme Court stated among other things at p. 166:

> "The only question is whether the legislature, in enacting the 1909 statute, was maintaining a due regard for the terms of the trust under which it held title to the lake beds of the State. • • • *if there were to be spelled out of the previous decisions of the courts any contrary holding as to the nature of the title of the State and its rights in and to the beds of navigable waters, the legislative declaration must govern* • • •".

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(p. 172) "Upon that statute we very definitely here rely as a legislative declaration of the law of this state with reference to the property of the state."

In its first opinion accompanying its order affirming the order of the District Court, the Minnesota Supreme Court passed directly upon the Constitutional question. In section 9 of its opinion (R. p. 28) while stating (contrary to all of its previous decisions and that of the lower court *which it affirmed*) that the riparian owners have only ordinary rights of "accretion and reliction" (which they have by common law even on tidewaters), the Supreme Court stated that their rights were "contingent only" and *"have been cut off before their consummation, by the foregoing legislative enactments."*

In section 17, appear the following specific rulings on the statutory and constitutional questions: (R. p. 42)

> "The foregoing authorities indicate that the State *under proper statutory authority,* may provide for the removal of ore beneath the beds of its navigable waters. *The statutory authority in the instant case is conferred by Laws 1917, Chapter 110,* and subsequent statutes cited supra, under which these operations have taken place. *Here, there is no attempt to deprive riparian owners or the public of their rights to navigation or other public uses of the waters involved, or to take from such shore owners their property without due process of law.* • • • The legislature has repeatedly declared title to such lands to be in the state, with the right in the latter to remove ore therefrom. Such removal is *consistent with the state's sovereign title as defined by the common law in existence at the time Minnesota was admitted to Statehood, and in subsequent interpretations thereof both by the United States Supreme Court and by this Court."*

(See further discussion of Minnesota Supreme Court opinion in Appendix "B" hereto).

In their petition for reargument in the Minnesota Supreme Court appellants stated as follows:

> "The decision of the court, if allowed to stand, would deprive the defendants of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and, by giving effect to the various legislative enactments referred to in the opinion, impair the obligations of contract and contract rights in violation of Article I, Section 10, of that Constitution."

In their appeal from the judgment of the District Court to the Minnesota Supreme Court, appellants filed the following assignments of error: (App. Brf. p. 4)

> "1. The Court erred in rendering judgment against defendants, riparian owners, in favor of plaintiff, State of Minnesota, for the reason that the judgment deprived defendants of their vested property rights in that part of their respective lots in Sections 5 and 6 in Township 58, North, Range 15 West, St. Louis County, Minnesota, which had been formerly overlaid by the waters of Syracuse Lake, and in, to and under the mining leases they have given thereon and the royalties or other compensation accruing to them under such leases, without due process of law in violation of the provisions of Article I, Section 7 of the Constitution of the State of Minnesota and in violation of Article XIV, Section 1 of the Constitution of the United States.
>
> "2. The Court erred in rendering judgment against defendants, riparian owners, in favor of plaintiff, State of Minnesota, for the reason that by such judgment the Court gave effect to Laws of Minnesota, 1909, Chapter 49, and Laws of Minnesota, 1917, Chapter 110, which appropriated defendants', riparian owners'

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vested property rights in and to the iron ores and other minerals in that part of their said lots involved in said judgment, and in, to and under their said leases and the royalties, and other compensation accruing to them under said leases, and held that such statutes are valid and did not deprive said defendants of their property without due process of law in violation of the provisions of Article I, Section 7 of the Constitution of the State of Minnesota, and in violation of the provisions of Article XIV, Section 1 of the Constitution of the United States, and further held that said laws did not impair appellants' obligations of contract contrary to Article I, Section 11 of the Constitution of the State of Minnesota, and contrary to Article I, Section 10 of the Constitution of the United States."

The Minnesota Supreme Court affirmed the judgment of the District Court. (R. p. 48.)

The Federal Constitutional issues were thus raised by appellants in their first pleadings, and were again raised in each subsequent pleading filed in both State courts; these issues were treated on brief by both appellants and the State; and they were directly passed upon both by the District Court and the Minnesota Supreme Court.

Statement of Grounds upon Which It Is Contended That the Questions Involved Are Substantial

Minnesota Laws of 1909, Chapter 49, and Laws of 1917, Chapter 110, as construed and applied in this case, impair appellants' obligations of contract in violation of Article I, Section 10 of the United States Constitution, and deprive appellants of their property without due process of law in violation of Section I of the Fourteenth Amendment thereto.

A. *The alienable, proprietary, beneficial rights and uses in and to said 33 acres were duly vested in appellants and their predecessors by the various conveyances to them made prior to said 1909 and 1917 statutes and under the established law in Minnesota with respect thereto.*

1. Appellants' titles stem from original grants of United States government patents issued with respect to the various lots from 1884 to 1896 and various intermediate deeds and conveyances. Such patents, deeds and conveyances under which appellants have acquired and hold their rights to the 33 acres of land in question, and the various mining leases which had been given thereon by appellants in 1903 and later years, are contracts, the obligations of which are within the protection of the United States Constitution.

Fletcher v. *Peck*, 6 Cr. 87;
Appleby v. Delaney, 271 U. S. 403, 409;
Appleby v. New York, 271 U. S. 364, 381, 391;
Coolidge v. Long, 282 U. S. 582, 595.

2. The governing law at the time of each such patent and conveyance was a part thereof and rights once vested in accordance therewith could not thereafter be appropriated by the State except for a public purpose, under due process of law and with proper compensation.

Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 415;
Appleby v. New York, 271 U. S. 364, 380;
Appleby v. Delaney, 271 U. S. 403, 409;
Coolidge v. Long, 282 U. S. 582, 595, 605-606;
Hanford v. St. Paul & Duluth R. R., 43 Minn. 104, 114;
Bradshaw v. *Duluth Imperial Mill Co.*, 52 Minn. 59, 64.

3. The basic governing law with respect to such conveyances as announced by the Supreme Court of the United States, is:

(a) If the waters were not "navigable" under the federal tests (even though they may have been "pub-

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lic" waters), then under the United States government patents, the lot owners were vested with title to the thread of the stream or the center of the lake.

Oklahoma v. *Texas*, 258 U. S. 574, 583;
United States v. Utah, 283 U. S. 64, 75;
United States v. Oregon, 295 U. S. 1, 6.

(b) If the waters were navigable under the federal tests the effect of the patents and conveyances and the respective and relative rights and interests of the state and of the lot owners in the waters and their beds are to to be determined in accordance with the law of the state where the same are located as declared or construed by its courts.

St. Louis v. *Rutz*, 138 U. S. 226, 242;
Hardin v. *Jordan*, 140 U. S. 371, 380;
Shively v. Bowlby, 152 U. S. 1, 14, 40;
St. Anthony Falls Water Power Co. v. *Board of Water Commissioners*, 168 U. S. 349, 358;
Kaukauna Water Power Co. v. *Green Bay & Mississippi Canal Co.*, 142 U. S. 254, 271.

In *St. Louis* v. *Rutz*, 138 U. S. 226, this Court said at page 242:

> "The question as to whether the fee of the plaintiff, as a riparian owner on the Mississippi River, extends to the middle thread of the stream, or only to the water's edge, is a question in regard to a rule of property, which is governed by the local law of Illinois • • • *The Supreme Court of Illinois has established and steadily maintained, as a rule of property, that the fee of the riparian owner of lands in Illinois bordering on the Mississippi River extends to the middle line of the main channel of the river.*"

4. The governing law in Minnesota under which appellants' rights have so vested has been throughout (except for said invalid statutory enactments and the judgment in

this case which gives effect thereto for the appropriation of such vested rights) as follows:

(a) Minnesota has generally and primarily classified waters in the State as either "private" or "public". (See Minnesota Laws 1897, Chapter 257, Appendix A, pps. i to iii; and other statutes and cases herein cited). It has referred to the federal distinction between waters commercially navigable in fact and other public waters, but the distinction required by the federal cases has not been important or often made because of the nature of the rule applied by the State to all public waters as hereinafter discussed. It has therefore, as in *State* v. *Korrer,* 127 Minn. 60, 63 (1914), generally treated its broad definition of "public" waters as an extension of "navigable" waters to include all types of waters useful for any public purpose.

(b) If the waters are "private", the lot owners own the waters themselves and their beds in severalty, taking to the thread of the stream or the center of the lake;

(c) If the waters are "public" waters:

(1) The State owns the inalienable governmental rights and probably holds bare technical title but only in its governmental and not in any proprietary capacity and only in trust for the protection and preservation of the public use of the waters for the purposes for which they are adapted; and

(2) The lot owners own in severalty all of the alienable, proprietary, beneficial rights and uses, subject only to such inalienable, governmental rights of the State.

Schurmeier v. *St. Paul & Pacific R. R. Co.,* 10 Minn. 59 (1865) affd. 74 U. S. 272;
Brisbine v. *R. R. Co.,* 23 Minn. 114 (1876);
Union Depot v. *Brunswick,* 31 Minn. 297 (1883);
Miller v. *Mendenhall,* 43 Minn. 95 (1890);

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Hanford v. *St. Paul & Duluth R. R.*, 43 Minn. 104 (1889) Reargued 1890;
Gilbert v. *Eldridge*, 47 Minn. 210 (1890);
Bradshaw v. *Duluth Imperial Mill Co.*, 52 Minn. 59 (1892);
Lamprey v. *State*, 52 Minn. 181 (1892);
State v. *Korrer*, 127 Minn. 60 (1914);
Nelson v. *DeLong*, 213 Minn. 425 (1942).

(See also Appendix A hereto for discussion of the various early Minnesota statutes which recognized or gave effect to the foregoing principles and defined "private waters" to include all lakes which were not "more than 160 acres in extent").

The above cited cases and others are consistent authority (unbroken until this case) for such statements as the following:

Bradshaw v. *Duluth Imperial Mill Co.*, 52 Minn. 59, p. 65:

"It is the settled law with us that the rights of the state in navigable waters and their beds are sovereign, and not proprietary, and are held in trust for the public as a highway, and are incapable of alienation." (Citing cases).

State v. *Korrer*, 127 Minn. 60, p. 72:

"This private right of use and enjoyment *is not limited to purposes connected with the actual use of the navigable water, but may extend to any purpose not inconsistent with the public right.* (Citing cases).

"The riparian owner has, subject to this public right, *the exclusive right of possession and the entire beneficial interest in the surface of the underlying soil.*" (Citing cases).

"He has the exclusive right, absolute as respects *every one but the state, and limited only by the public interests of the state for purposes connected with public uses*—to improve, reclaim and occupy the sur-

face of the submerged land, out to the point of navigability, for any private purposes, *as he might do if it were his separate estate.*" (Citing cases).

"The exercise of such rights, though subject to state regulation, *can be interfered with only for public purposes.* The rights which thus belong to him as riparian owner of the abutting premises are valuable property rights *of which he cannot be divested without consent, except by due process of law, and, if for public purposes, upon just compensation.*"

Lamprey v. *State*, 52 Minn. 181, p. 198: (and other cases).

"• • • *we have repudiated the doctrine* that the state has *any* private or proprietary right (as had the king) in navigable waters, but it holds them in its sovereign capacity, as trustee for the people, for public use."

Miller v. *Mendenhall*, 43 Minn. 95, p. 96:

"• • • the state holds title to low-water mark in its governmental capacity in trust for the people, for the purpose chiefly of protecting the rights of navigation. *But, though the title is nominally in the state, the common right of the people is limited to what is of public use for the purposes of navigation and fishery; and the riparian owners are permitted to enjoy the remaining rights and privileges in the soil under water beyond their strict boundary lines, after conceding to the state all public rights.*"

P. 101:

"• • • While the public right of navigation and fishery may not be extinguished until the waters are excluded, *yet, after the submerged land is filled or occupied the riparian owner will have the exclusive right of possession, and the entire beneficial interests;* and whether this dominion would be absolute and his title indefeasible as against the state, is not necessary to inquire."

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Hanford v. *St. Paul & Duluth*, 43 Minn. 104, p. 113:

> "*This private right of use and enjoyment is not*, we think, *limited to purposes connected with the actual use of the navigable water, but may extend to any purposes not inconsistent with the public right.* • • •
>
> "It is for the interest of the State that such lands, not available for the public purposes for *which alone the State exercises authority over them*, shall be improved and used for profitable enterprises, rather than that they lie forever waste and unproductive."

P. 114:

> "This right of the riparian proprietor even before it has been in any manner exercised by reclaiming or improving the premises,—*the right itself* to reclaim, improve, or *occupy*,—is a *property right, vested in him, recognized and protected in the law as property.*"

See also *Hobart* v. *Hall*. 174 F. 433 (affd. 186 F. 426), where Judge Morris thoroughly reviewed the Minnesota decisions and clearly summarized the above indicated conclusions therefrom at pages 475-6, particularly the statements at page 476:

> "• • • the limit to this private right (of the lot owners) is imposed by the public right, *and by that only*, and the private right exists up to the point beyond which it would be inconsistent with the public right, *and with that only.*"

State v. *Korrer*, 127 Minn. 60, involved Longyear Lake, with an area of 150 acres. A riparian owner and his lessee filled part of the lake without the State's consent and started to mine iron ore from the bed. The action was brought by the State for an injunction to restrain such filling and reclaiming of the bed. While summarizing the rights of the State and the lot owners as indicated above, the court, of course, held that the State had the power to

preserve its public lakes for the use of the public, and that a riparian owner could not destroy such a lake against the protest of the State.

(In the instant action, the waters of Syracuse Lake had been drained and diverted under the authority and direction of the State, and the only issue is as to the ownership of the proprietary, beneficial rights and uses in the area which formerly was the bed of the lake).

There was also placed in issue by the State in the *Korrer* case the question of the ownership of the ore below low water mark. The court below had permitted the continuation of the mining operation during the proceedings under a stipulation that the mining company would pay the State 60 cents per ton for the ore so removed which it should finally be adjudged did not belong to the fee owners of the shore lots at the beginning of the action. As this stipulation had not been specifically passed upon, the Attorney General filed a petition setting up that the ownership of such ore was in question in the case and asking a definite and clear ruling on such ownership question.

In a supplemental opinion the court reaffirmed its original findings that the state had no proprietary interest and held that *the State had "no right to recover the value of the ore"*. At page 78:

> "A majority of the court construe this stipulation as giving the State the right to an accounting only in event the State is found to be the owner in a proprietary capacity of the mineral underlying Longyear Lake. The decision of this court explicitly holds that the State owns the bed of the lake below low water mark 'not however, in the sense of ordinary absolute ownership, with the right of alienation, but in its sovereign governmental capacity, for the common public use, and in trust for the people of the State, for the public purposes for which they are adapted.' From this it necessarily follows *that the State has no right to recover the*

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value of the ore and no right to an accounting under the stipulation."

It is interesting to note that the court did not mention Laws of 1909, Chapter 49, in *State* v. *Korrer*, 127 Minn. 60, and thus in effect held that statute invalid by deciding that, under the law established by its prior decisions, the State had no proprietary interest in the iron ore under Longyear Lake.

The actual holdings of the Minnesota cases and the legislative policy as shown by an early statute can be grouped and condensed as follows:

1. Where navigable waters have been removed by filling with proper governmental consents, the resultant lands belong to the shore owner who is entitled to be paid the full value thereof on condemnation proceedings. *Brisbine* v. *Railroad Co.*, 23 Minn. 114 (1876);

2. This is true even where the State by special legislation had granted to the condemner all rights it might have in the bed or the filled lands,—as the State had no alienable, proprietary rights to give.

Union Depot v. *Brunswick*, 31 Minn. 297 (1883).

3. The shore owner may plat lots under navigable waters and separately sell and convey good title to the same, subject only to the State's paramount governmental rights as above indicated.

Miller v. *Mendenhall*, 43 Minn. 95 (1890);
Hanford v. *St. Paul & Duluth R. R.*, 43 Minn. 104 (1889);
Gilbert v. *Eldridge*, 47 Minn. 210 (1890);
Bradshaw v. *Duluth Imperial Mill*, 52 Minn. 59 (1892).

4. Where a 300 acre lake dries up, the shore owners are the owners of the bed.

Lamprey v. *State*, 52 Minn. 181 (1892).

5. Where, through the growth of vegetation or otherwise, a public lake ceases to be useful to the public, it

becomes a private lake, and the shore owners own full title.

Chapter 257, Minnesota Laws 1897.

6. Where a lake is artificially drained under state authority, the bed belongs fully to the shore owners.

U. S. v. *Holt State Bank*, 270 U. S. 49 (1926); *Rooney* v. *County of Stearns*, 130 Minn. 176 (1915); See also Appendix A, page *iii*.

7. While the state may restrain any interference with public waters not authorized by it in its governmental capacity, it has no proprietary ownership of iron ores under the beds of such waters and *cannot collect any payment therefor even when such ores were removed in connection with an unauthorized and restrained interference with the state's governmental rights and powers*, *State* v. *Korrer*, 127 Minn. 60 (1914), particularly supplemental opinion (pps. 77-78).

(See Footnote 1).

Note 1.—The effort in each of the court opinions in this action to, (1) treat mining iron ore as a public right and (2) to say that the leasing of mining rights is not an alienation thereof, make relevant two additional, simple basic principles:

(a) the right to mine and remove iron ores from lands is of course a proprietary, beneficial right and use.

Stanton v. *Baltic Mining Co.*, 240 U. S. 103;
Oliver Iron Co. v. *Lord*, 262 U. S. 172, 177;
State v. *Korrer*, 127 Minn. 60, where the Minnesota Supreme Court stated (p. 62):

"The real issue involved is whether the state has such interest in this body of water and the bed thereof that it may enjoin the defendants from filling in and reclaiming the bed of the lake *for the purely private purpose of removing the underlying ore.* We shall address ourselves to that issue."

And again, (p. 73):

"Manifestly, if the lake can be filled in *for this private purpose* it may be filled in for any private purpose, as for agriculture, or grazing, upon a showing of greater utility being subserved by such private use."

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B. *The 1909 and 1917 Statutes and said final judgment giving effect thereto are in conflict with Article I, Section 10 of the United States Constitution and Section 1 of the Fourteenth Amendment thereto.*

It is well settled that a State statute which interferes with vested rights, either by impairing the obligations of contract, or by appropriating private property otherwise than for public use and with proper compensation, is in conflict respectively with Article I, Section 10, of the United States Constitution, and Section 1 of the Fourteenth Amendment thereto, and hence is invalid.

Louisiana v. *New Orleans*, 102 U. S. 203, 206-207;
Siebert v. *Lewis*, 122 U. S. 284, 299-300;
Bank of Minden v. *Clement*, 256 U. S. 126, 128-129;
Chicago, Burlington & Quincy R. R. Co. v. *Chicago*, 166 U. S. 226, 241;
Appleby v. *New York*, 271 U. S. 364, 391, 403;

(b) the leasing of mining rights is an alienation thereof.
U. S. v. *Gratiot*, 39 U. S. 526, 538;
Hill v. *Sumner*, 132 U. S. 118.

While the Minnesota opinions in our case stated that "leasing" is not an "alienation," the only authority cited for such a rule is a case holding that "leasing" land is not a "sale" of land under the State constitutional restriction on the "sale" of state lands without competitive bidding. Furthermore, the district court's conclusion of law (which became its judgment and the judgment affirmed by the Minnesota Supreme Court from which this appeal is taken) expressly found with respect to the "ores and minerals" that the state could "*dispose* of same by lease" (R., p. 323).

"Alienate" and "dispose" are synonymous.

Webster's New Dictionary, Second Ed., p. 752;
Black's Law Dictionary, 1944, p. 592;
Bouvier's Law Dictionary, 1914, p. 888;
Phelps v. *Harris*, 101 U. S. 370;
Merchants National Bank v. *First National Bank*, 238 F. 502.

Thus the judgment here appealed from characterizes leasing as a "disposition" or alienation in spite of the statement in the court's opinion to the contrary.

Appleby v. *Delaney*, 271 U. S. 403, 409;
Muhlker v. *Harlem R. R. Co.*, 197 U. S. 544, 570-571;
Coolidge v. *Long*, 282 U. S. 582, 597, 605-606.

Not even a valid exercise of the police power will justify appropriation of private property rights without compensation.

Dobbins v. *Los Angeles*, 195 U. S. 223, 241;
Pennsylvania Coal Company v. *Mahon*, 260 U. S. 393, 415.

Under the established law in Minnesota as it existed to the time of the judgment in this case, as heretofore shown, the alienable, proprietary, beneficial rights and uses in and to said lands had long been vested in appellants and their predecessors through the various conveyances in their respective chains of title; and such conveyances and the various mining leases and agreements entered into by appellants and their predecessors under such established law are contracts, the obligations of which are protected against impairment.

Said 1909 statute expressly attempted to appropriate to the State without compensation the alienable, proprietary, beneficial rights and uses in and to the "iron ores and minerals" in said lands which had thus become vested in appellants and to impair and destroy their obligations of contracts in regard thereto; said 1917 statute implemented said appropriation and impairment by providing for the private leasing of said iron ores in similar violation and impairment of appellants' vested rights and obligations of contract; and said final judgment applied and gave effect to both of said statutes, expressly approved the State lease of said ores and denied to appellants their proprietary rights in said ores and to royalties under their said contracts.

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C. *Practical Substance and Importance of Constitutional Question*

The constitutional question here is of substantial *practical* importance because it involves:

(a) The integrity of important principles of real estate law as they have existed for many years in the State of Minnesota; and

(b) Important private rights in this and other large areas of Minnesota.

The record shows that prior to 1928 over 150 meandered public lakes in the State had been drained under State authority. In line with the recognition of the foregoing principles by the State drainage acts above referred to and the decisions of its highest court, the former beds of such lakes are undoubtedly being used by the lot owners and their successors for many and varied private purposes.

While the decision appealed from takes from appellants their proprietary, beneficial rights and uses in only the "iron ores and other minerals" (appropriated by the 1909 and 1917 statutes), such ores and minerals are of large value and of course constitute the principal private property values in the lands here in dispute. Furthermore, if the State by legislation can appropriate to its own use the "iron ores and other minerals" in the lands under these public waters, it can, with equal effectiveness, appropriate by legislation the farming, grazing and other private rights and uses thereof.

The opinion of the district court expressly takes the position (and the judgment follows the theory) that, because the Minnesota courts had not (until the *Korrer* case) specifically found proprietary ownership of "iron ores and other minerals" (as well as the land generally) to be in the shore owners, the 1909 Act appropriating the "iron ores

and other minerals" was not invalid as in violation of rights which had vested under the previously established rules of property.

Iron ores and other minerals in land are, of course, as much a part of the land as is clay, gravel, etc. All land contains some iron. Certainly its legal characteristics as land cannot differ on the basis of the percentage of iron contained within it. Legally, "land" includes everything contained therein, including all minerals in or under the land.

Higgins Oil & Fuel Co. v. *Snow*, 113 F. 433; 51 C. C. A. 67;
Aris v. *First National Bank*, 162 S. W. 2d. 1072, 1076.

All previous holdings of the State courts had confirmed in the shore owners *all* alienable, proprietary, beneficial rights and uses in and to *the land* generally, subject only to the State's inalienable, governmental rights for the protection of the common public use of the waters. Until the *Korrer* case, the specific application of the rule to some particular ingredient of the land had not been raised. In the *Korrer* case the rule was specifically applied to iron ore. In all subsequent cases the rule has been reaffirmed in general terms.

State ex rel. County of Jackson v. *District Court*, 146 Minn. 150 (1920);
In re Petition of Shaller, 193 Minn. 604 (1935);
Meyers v. *Lafayette Club*, 197 Minn. 241 (1936);
Nelson v. *DeLong*, 213 Minn. 425 (1942).

In this case the rule is denied by the judgment only as to the "iron ores and other minerals" sought to be appropriated by the 1909 and 1917 statutes which had been properly disregarded in the *Korrer* and subsequent cases.

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But if the general rule can be set aside by statutory enactments with respect to specific contents or uses of the land because such contents or uses had not been specifically mentioned in cases announcing the general rule, additional legislation may still be enacted appropriating many other contents and uses which have not been specifically mentioned in any of the cases establishing the general rule.

Such effort to remove the mineral bearing contents of land from the general rules applying to the land is not only illogical on its face but runs flatly contradictory to many of the decided cases.

The Minnesota condemnation cases held the shore owners entitled to "full value", which must of necessity have included *all contents and uses of the land.*

The cases involving artificially drained and dried-up navigable lakes held *full title in the lot owner,* which must have included *all contents and uses.*

The cases establishing the rights of the shore owner to plat and sell under-water lots and convey good title thereto, subject only to the State's governmental rights for the preservation of the public use of the water, similarly must have involved *all contents and all proprietary and beneficial uses.*

D. *Constitutional Question cannot be Avoided Where it Exists in Substance*

Two other principles of law may possibly become relevant here, namely:

(a) Contracts may be impaired or property taken without due process of law, by the decision of a State court which actually gives effect to a State statute, although the court's opinion may put forth other grounds for the decision.

Houston & Central Texas R. R. v. *Texas*, 177 U. S. 66, 77;

Terre Haute & Indianapolis R. R. v. *Indiana*, 194 U. S. 579, 589;

Columbia Ry. v. *South Carolina*, 261 U. S. 236, 244-247.

(b) In determining whether State legislation impairs contract or other rights protected by the Federal Constitution, the Supreme Court of the United States will itself determine the existence of such rights, and the effect thereon of the subsequent legislation.

Mobile & Ohio R. R. v. *Tennessee*, 153 U. S. 486, 493-495;

McCullough v. *Virginia*, 172 U. S. 102, 109-110;

Louisiana Ry. & Navigation Co. v. *New Orleans*, 235 U. S. 164, 170-171;

Ward v. *Love County*, 253 U. S. 17, 22;

Railroad Commission v. *Eastern Texas R. Co.* 264 U. S. 79, 86-87;

Appleby v. *New York*, 271 U. S. 364, 380;

Coolidge v. *Long*, 282 U. S. 582, 597;

Lawrence v. *State Tax Commission*, 286 U. S. 276, 282;

Such principles, of course, need be called in here only if it should be claimed that the constitutional questions raised by the pleadings and argued throughout did not substantially enter into the judgment appealed from.

We do not believe that such claim can or will be made because the contrary is shown (1) on the face of the judgment itself, and (2) by the language of the related opinions.

(1) The judgment here appealed from is the final judgment of the Supreme Court of Minnesota, which affirmed and adopted the judgment of the District Court (R. p. 49) and, in language and form, simply gave effect to the District Court's conclusion of law (R. pp. 322-323) as amended (R. pp. 359-361).

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This held generally, as to the former lake bed lands, only that the State held them:

> "in its sovereign, governmental capacity, for common public use and in trust for the people of the state for the public purposes for which it is adapted, but not in absolute proprietorship with right of alienation * * *" (R. pp. 322-323; 360-361).

This was, of course, substantially in accord with the previous holdings of the court and was not inconsistent with the ownership by the shore owners (subject to such governmental rights) of the alienable, proprietary, beneficial rights and uses in such beds as theretofore consistently found.

The court then proceeded to conclude, however, that the State was also the

> "owner of all *iron ores and other minerals* on, in or under said lands, below low water mark, underlying Syracuse Lake, *with right to dispose of same by lease,* subject to the lease to John R. Vanderlip, dated July 18, 1918, *which it was lawfully entitled to make,* and that none of the defendants are entitled to receive or be paid any royalties or other compensation *for any of said ore.*"
>
> (R. pp. 322-323; 360-361).

Such a separate and different conclusion as to the ownership and right to "dispose of" or alienate *only* the "iron ores and other minerals", and the exclusion of defendants from *only* the right to receive "any royalties or other compensation *for any of said ore*", could *only* have been arrived at by giving effect to the contested 1909 and 1917 statutes which in turn sought to appropriate to the State *only* the "iron ores and minerals" in such beds.

Furthermore, by its complaint the State had claimed full fee title (*both governmental and proprietary*) *with full right of alienation in the lands themselves,* as well as the

ores and minerals in them, and had claimed that the defendants had no interest of any kind whatsoever *in either the lands generally* or their ore and mineral contents.

Although again requested to do so by the State's motion for the amendment of the District Court's original findings (R. pp. 322-323), the Court by its supplemental order (R. pp. 359-360) *expressly declined to find* that "none of the defendants has any estate or interest in, or lien upon, the bed of said Syracuse Lake below low water mark • • • ".

In its supplemental memorandum (R. p. 364) the Court said:

> "The additional matter requested by the State included a finding *that the riparian owners had no interest in the lake bed,* below low water mark. *I do not agree with that contention".*

Thus it seems clear from the judgment itself that the only alienable, proprietary, beneficial rights and uses which it attempts to either (1) establish in the State, or (2) deny to the lot owners, are those in the "iron ores and other minerals" sought to be appropriated to the State by such 1909 and 1917 legislation.

Even though directly in issue, the judgment specifically declined to place in the State or to take from the defendants any other alienable, proprietary, beneficial rights and uses.

Furthermore, by the "lease to John R. Vanderlip of July 18, 1918", which the judgment expressly held to be lawful, the State undertook to lease to another—

> "that portion of lots five and six of section five and that portion of lots nine, ten, eleven and twelve of section six, all in township fifty-eight north, of range fifteen west, constituting the bed of Syracuse Lake". (R. p. 5).

Such lease, thus, by its terms, undertook to lease parts of the lots which it is admitted in this case belong to appellants.

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Under the settled law in Minnesota at the time such lease was given that was the normal, proper way to describe the lake bed lands here in question. They were a part of such lots subject only to the State's inalienable governmental rights "for the protection of the common public use of the waters for the purposes for which they were adapted."

Such lease also shows on its face (R. p. 12) that it was given pursuant to said 1917 Act. Thus, in sustaining the validity of such lease, which by its specific terms applied to part of appellants' property, the judgment appealed from directly sustained the taking of appellants' property (by name and in substance) by such lease and such 1917 statute.

(2) The relevant opinions also show that the constitutional questions were substantial to the judgment appealed from.

The memoranda of the District Court are discussed herein at pages 14 to 16.

The Minnesota Supreme Court's direct disposition of the constitutional question raised by the pleadings and implicit in the judgment has been discussed at pages 17 to 19 hereof.

While the limited and specific nature of the judgment of the district court (the affirmance of which is alone involved in this appeal) makes most of the reasoning of the Minnesota Supreme Court's opinion dicta, a brief discussion of some of the basic errors found therein is attached hereto as Appendix B.

In any event, the constitutional questions raised by the pleadings, maintained in the briefs, and implicit in the judgment appealed from, cannot (under the practical principles repeatedly laid down by the United States Supreme Court) be avoided here by any language or reasoning in the opinion of the State Court. (See above pages 33 to 35.)

Be giving effect to Minnesota Laws of 1909, Chapter 49, and Laws of 1917, Chapter 110, the decision of the District

Court, affirmed by the Minnesota Supreme Court, if permitted to stand, impairs the obligations of appellants' contracts and deprives appellants of their property without due process of law. The decision, as it stands, opens the way for the appropriation by the State of many hundreds of millions of dollars of what heretofore has uniformly been held to be private property. There is left no apparent limit to the power of the legislature to seize and use for private exploitation and without compensation to the owners, private rights of every sort heretofore vested under established Minnesota law.

We respectfully submit that the federal questions involved are substantial and are of exceptional public importance; and that the Supreme Court of the United States has jurisdiction of this appeal.

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APPENDIX A

Early Minnesota Statutes and Decisions in Connection Therewith

In 1897 the Minnesota Legislature passed Chapter 257, Minnesota Laws 1897, entitled:

> "An Act to define the right of shore owners in the beds of meandered streams or lakes within the state and to provide for the partition of such lands *between the respective owners thereof.*"

It provided as follows:

> "Section 1. All lakes and streams in this state which have been or may hereafter be meandered in the government surveys are hereby classified into *public* waters and *private* waters. All such meandered rivers, and all meandered lakes of *more than one hundred and sixty (160) acres in extent* which are of sufficient depth and volume to be capable of any beneficial public use for fishing, fowling, boating or furnishing water supply for domestic, municipal or agricultural purposes, shall be known as *public waters.*
>
> *All meandered lakes* and streams *not included in the above classification shall be known as private waters.*[*]
>
> "Section 2. In all cases where any lake belonging to the class of *private waters* above mentioned has been so meandered in the government survey, the owners of the lands abutting upon the shores of said lake *shall be the owners in common of the bed thereof;* and for the purpose of this act the bed of such lake shall be deemed to include all the lands within the meander lines established by such government survey, and the rights of the respective shore owners in case of the partition of such lake bed as hereinafter provided, shall be in proportion to the length of the meander line upon the tract or tracts owned by each. And in all cases

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[*] Syracuse lake was only 33 acres in extent and was thus classified as a "private lake".

where such meandered lakes come within the classification of *public waters* the bed and waters thereof shall belong to the state and in its *sovereign capacity*, in trust for the people *for public use*, and the shore owners shall own in common the fee in the lands to the water's edge thereof. Provided, that *whenever the waters of any such lake so far recede or dry up as to reduce said lake* within the classification of 'private waters', as above defined, the title of the state and its trusteeship shall cease, and the bed of said lake shall pass to and *be divided among the owners of the shore of the same as if said lake had always belonged to the class of private waters.*"

"Section 3. In all cases where any river or other stream including any marsh or swamp appurtenant thereto has been or may hereafter be meandered in the United States government survey of any of the land within this state, *the owner of lands abutting upon said stream or river shall be the owner of the bed of said stream*, with all accretions or relictions, or intervening islands *to the thread of said stream*; or if said stream dries up then to the point where the thread thereof was located. * * * *Provided further*, that in all cases where such stream or river comes within the classification of public waters, as above defined, the title to the actual bed of said river and the waters therein shall be held in trust by the state in its sovereign capacity for public use, *during all the time while said river is adapted to any such public use*, and upon the drying up of the same such trusteeship of the state shall cease. But such trusteeship shall not in any manner interfere with establishing the boundaries of the lands adhering to the lands of any shore owner by reason of accretions or reliction as above provided."

"Section 4. * * * any person having an actual interest * * * may bring an action in the district court * * * to have partition thereof made according to the respective rights of said shore owners. * * *".

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Provision is then made for the partition of such "common" ownership of the bed and for its sale in case partition in kind is not feasible.

The constitutionality of such act was raised in *Shell* v. *Matteson*, 81 Minn. 38 (1900), which involved a proceeding under the act to partition the bed of a meandered lake of more than 160 acres the waters of which had gradually receded and ceased to be "of sufficient depth to be of any beneficial public use." The Minnesota Supreme Court held the act invalid as an unconstitutional effort to change *the shore owners' rights "in severalty"* in the bed as established by the settled law in Minnesota into a right "in common", saying, page 41:

> *"As we have stated, the shore owners adjoining lakes of the character of this one own the bed of the lake in severalty; and it cannot be doubted but that such ownership is a vested right, and a right which cannot be taken away by the legislature, except by due process of law, and for some recognized public purpose.* It is universally held that statutes which in effect divest and impair vested rights are unconstitutional and void. • • • The Act in question is not confined to a method or course of procedure for the settlement or adjustment of the boundary lines between the different owners of such lake beds, but is an attempt to fix and determine the rights or property therein; declaring, *contrary to the settled law of the land*, that the shore owners are owners *in common* of the bed of the lake."
>
> • • • • • • •
>
> *"The most that the legislature can do in the matter of such lakes is to provide a procedure or method for determining the boundary line between the shore owners."*

In connection with Section 3 of the above mentioned 1897 Act, it should be noted that that section more clearly limits the duration of the state's trust for the preservation of the "public use" of the waters to "the time while said river is adapted to any such public use"; and that the Minnesota

courts have consistently held, and *have held in this case,* that the rule as to public rivers is the same in Minnesota as it is with respect to public lakes. (R. pp. 327-328;)

> *Lamprey* v. *State,* 52 Minn. 181, 198;
> *State* v. *Korrer,* 127 Minn. 60, 70.

Chapter 230, Minnesota Laws 1905, "An Act providing for the drainage of lands and meandered bodies of water in certain cases, * * *", provided:

> "Section 1. The board of county commissioners in any county shall have power * * * and they * * * may drain the channel or bed of any * * * lake or other natural course, *whether navigable and whether meandered or not* * * *"

under and subject to certain provisions and conditions.

Section 6 provided for the appointment of three reviewers who

> "shall prepare a tabular statement showing, as far as practical, the names of the owners of each tract of land to be benefitted or damaged; the estimated number of acres in each of said tracts of land to be benefitted or damaged (as the case may be); *the number of acres added to any tract by the total or partial drainage of meandered lakes,* or by the change of any water course, and the location and value of such added land; * * *"

> "Section 7. "All lands benefited * * * shall be assessed in proportion to the benefits for the construction thereof * * *",

Section 9 (last paragraph):

> "* * * The board of county commissioners shall have jurisdiction of each tract of land and of all other property in said bureau's report described, *including any land added by the drainage of any meandered lake or by the change of any water course* * * *."

By certain amendments to Sec. 9, provided by Chapter 384, Laws 1911, developing procedures for judicial review

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of such drainage act proceedings, it was expressly provided in the last paragraph of Sec. 3 of such Act that

> "At such final hearing * * * the judge of the district court *shall divide and apportion among the persons entitled thereto by law the bed of any lake or lakes drained or to be drained in any such ditch proceeding.*"

The foregoing laws (1905 and 1911) were collected in Minnesota General Statutes 1913, Sec. 5481, *et seq.* It was under these laws that the Mud Lake, involved in *United States* v. *Holt State Bank,* 270 U. S. 49 (1926) was drained. In that case the Minnesota District Court made findings that the former bed of Mud Lake, which had been *navigable* and meandered, belonged to the shore owners, in such language as the following:

> "* * * the defendant Knute O. Flakne *is the owner of lot four* of Section eight, in township one hundred fifty six, range forty one, in Marshall County, Minnesota, and *that portion of the bed of Mud Lake contiguous thereto* * * * *to the center of the lake.*"

Judgment of the District Court for the Fourteenth Judicial District of Minnesota, February 18, 1914, (Page 191 of the Record filed in the United States Supreme Court in *United States* v. *Holt State Bank,* 270 U. S. 49).

The United States Government later sued in the Federal Courts, claiming title to the bed of the lake. The United States Supreme Court held that Mud Lake had been navigable under the federal tests prior to its draining, and that under Minnesota law the former bed of the lake belonged to the shore owners after draining of the lake.

Rooney v. *County of Stearns,* 130 Minn. 176 (1915) was an appeal over the method of dividing among the shore owners the bed of a lake drained under the provisions of the 1913 statutes. The lake in question was shallow, with an area of 372 acres, and was long and narrow. The court held that the method adopted by the district court was incorrect, and that the proper method of division was that used for the beds of rivers and streams. At page 179:

"It is perhaps unfortunate that, in drainage projects involving a meandered lake, the law does not provide, in the proceeding itself, for a division of the bed of the lake among the different shore owners. As it now is, after a person has paid an assessment *on the basis of having acquired a large acreage of land from the reclaimed lake bed,* he may find that in an action brought afterwards for partition, a great part thereof goes to other parties. Under existing provisions of the law, the assessment of benefits in drainage proceedings involving a lake bed, cannot be estimated on the exact acreage *which each shore owner will eventually acquire.* But the aim should be to approximate *what will finally be owned by each.*"

Thus, for many years these drainage statutes applied to meandered public lakes *"whether navigable or not"* and fully recognized, and expressly provided for detailed determinations in connection with the fact, *that under Minnesota law, upon the artificial drainage of any meandered lake, whether navigable or not, full title to the bed became fully vested in the riparian owners.*

APPENDIX B

Minnesota's Supreme Court's Opinion

The rationale of the State's argument in support of its claim was that, because it had sovereignty over navigable waters in the State "on an equal footing with the original states," it had full proprietary ownership of the lands covered by such navigable waters as a necessary incident to its sovereignty; and that such proprietary ownership could not be alienated except by an act of the legislature.

While the judgment appealed from did not in fact, as heretofore noted, give effect to this position, but only found to be in the State and denied to the shore owners proprietary rights in the "iron ore and other minerals" sought to be appropriated by the 1909 and 1917 statutes, the *opin-*

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ion of the Minnesota Supreme Court does appear in many respects to accept such argument. (See particularly section 5, R. p. 20; section 10, R. p. 30.)

The decisions of the Supreme Court of the United States clearly hold that, like the original thirteen states, Minnesota took such lands only in *eminent domain* and held them, as had the previous sovereign powers before it, subject to definition of its rights under the common law as declared by its courts or as fixed by valid legislation.

Pollard's Lessee v. *Hagan*, 3 How. 212, 222-223;
Shively v. *Bowlby*, 152 U. S. 1, 27.

The adoption by the Minnesota courts of the substance of the common law rules with respect to *fresh, non-tidal waters* was, of course, not a conveyance or sale of property privately owned by the state in a proprietary capacity. It was simply a proper common law definition of its rights in *eminent domain* passed to it by the previous sovereign holders thereof.

Hardin v. *Jordan*, 140 U. S. 371, 380, 384, 385;
Shively v. *Bowlby*, 152 U. S. 1, pp. 40, 57, 58;
Scott v. *Lattig*, 227 U. S. 229, 242, 243, 245.

The principle, that sovereignty over water areas does not carry, as a necessary incident, proprietary ownership of the lands beneath the water, has been affirmed and applied by the Supreme Court of the United States as recently as its decision in *United States* v. *California* (June 23, 1947) 332 U. S. *19*.

There it is stated (p. 29)—

> "California claims that it owns the resources of the soil under the three mile marginal belt *as an incident to its elements of sovereignty which it exercises in that water area.*"

The Court, however, upheld (p. 30-31) the government's position that "*ownership of such water areas, any more than ownership of uplands,*" *is not* "*a necessary incident of the state's sovereignty contemplated by the 'equal footing clause'.*"

Again, at page 31, it is said—

"From all of the wealth of material supplied, however, we cannot say that the original thirteen colonies separately acquired ownership to the three mile belt or the soil under it, *even if they did acquire elements of sovereignty of the English crown by their revolution against it.*"

The incidents of any elements of sovereignty are of course, in the absence of constitutional or other definitions, to be determined by the courts; and in the California case the Supreme Court of the United States found that earlier decision had not established proprietary rights in the three mile marginal belt to be in the State of California and that various considerations of usage and necessity required the finding "that the federal government rather than the state has paramount rights in and power over that belt, * * *."

The United States Supreme Court has always held that the definition of the sovereignty of a State with respect to *fresh navigable waters* within its borders, and of the private interests therein which become vested upon a conveyance of riparian property, is to be determined by the courts of such State.

Barney v. *Keokuk*, 94 U. S. 324;
Packer v. *Bird*, 137 U. S. 661;
Hardin v. *Jordan*, 140 U. S. 371;
Kaukauna Water Power Co. v. *Green Bay & Mississippi Canal Co.*, 142 U. S. 254;
Shively v. *Bowlby*, 152 U. S. 1;
St. Anthony Water Power Co. v. *Board of Water Commissioners*, 168 U. S. 349;
McGilvra v. *Ross*, 215 U. S. 70.

The following simple statement of the rule is taken from *Shively* v. *Bowlby*, 152 U. S. 1, p. 40:

"The later judgments of this court clearly establish that *the title and rights of riparian or littoral proprietors in the soil below high water mark of navigable waters are governed by the local laws of the several states*, subject, of course, to the rights granted to the United States by the Constitution."

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and in the *Kaukauna Water Power Co.* case, 142 U. S. 254, at page 271:

> "It is the settled law of Wisconsin, *announced in repeated decision of its Supreme Court,* that the ownership of riparian proprietors extends to the center or thread of the stream, subject, if such stream be navigable, to the right of the public to its use as a public highway for passage of vessels. • • • *With respect to such rights, we have held that the law of the state, as declared by its Supreme Court is controlling as a rule of property.*
>
> *Barney* v. *Keokuk,* 94 U. S. 324;
> *Packer* v. *Bird,* 137 U. S. 661;
> *Hardin* v. *Jordan,* 140 U. S. 371."

In *St Anthony Water Power Co.* v. *Board,* 168 U. S. 349, at page 358:

> "• • • We are of the opinion that the property rights of the plaintiffs in error, as riparian owners, *are to be measured by the rules and decisions of the state courts of Minnesota.* This principle, we think, has been announced and adhered to by this court from its very early days, and no distinction has been made between the rights of the original states and those which were subsequently admitted to the Union under the provisions of the Federal Constitution."

Under this rule Minnesota and many other States have followed the English common law rule with respect to fresh waters and found that conveyances of riparian lands vested all proprietary and beneficial rights and uses in the appurtenant under-water lands. (See Minnesota citations pages of the foregoing Statement as to jurisdiction.)

Hardin v. *Jordan,* 140 U. S. 371, pp. 382, 383, 385-387;
Scott v. *Lattig,* 227 U. S. 229, p. 245;
Kaukauna Water Power Co. v. *Green Bay & Mississippi Canal Co., supra,* p. 271;
St. Louis v. *Rutz,* 138 U. S. 226, p. 242;

United States v. *Holt State Bank*, 270 U. S. 49, p. 59;
Tiffany on Real Property, Sec. 661;
Thompson on Real Property, Sec. 3421; 3425;
Patton on Titles, Sec. 87;
27 Ruling Case Law, pp. 1362; 1369;
Farnham, The Law of Water and Water Rights, pp. 239; 245; 248.

The indication in the Minnesota Supreme Court's opinion in this case that the State has throughout owned the alienable, proprietary, beneficial rights and uses in such lands is flatly contrary to every decided case in Minnesota to the time of this case. (See pages 22 to 29 of the foregoing Statement as to jurisdiction.)

Other Errors in the Opinion

After referring to two of its many previous holdings that Minnesota had long "repudiated the doctrine that the State has any private or proprietary rights (as had the king) in navigable waters, * * *". The Minnesota Supreme Court said (R. p. 34):

> "The repudiation of this doctrine did not of necessity negative the absolute title of the state, subject only to its public trust, nor in any manner constitute a restriction on the state's right as trustee to dispose of beneficial interests in such lands, provided that in so doing it (a) acted for the benefit of all the citizens, and (b) did not violate the primary purposes of its trust, namely, to maintain such waters for navigation and other public uses."

Such statement, that the establishment of the doctrine that the State does *not* have "any private or proprietary rights" does not "negative" or restrict its right to dispose of the proprietary, beneficial interests in property, is certainly *a non-sequitur. If the State did not have "any" such private rights, it could hardly "dispose" of them whether for the public good or otherwise.*

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In Section 12 of its opinion (R. p. 35), the Court indicates that, because its trust is for the common public use of the waters and beds for the purpose for which they are adapted, it is its duty "to use such lands for the greatest public good, and, where they can be put to productive use, not to permit them to lie waste and unproductive". This is the language of *Hanford* v. *St. Paul & Duluth R. R.*, 43 Minn. 104, and related cases, supra, *in reverse*. There it was said (p. 113):

> "It is for the interests of the state that such lands, *not available for the public purposes for which alone the state exercises authority over them* shall be used and improved for profitable enterprises (by the lot owners) rather than that they lie forever waste and unproductive."

Thus, in the *Hanford* and other cases and down to the present time, the court had expressly recognized that the State, with only its inalienable governmental rights, could not make private use of the beds and that it was in the public interest that the owners of the private rights therein should be permitted, as far as possible without interference with the governmental rights, to make use of them.

If the principle now indicated is to control, it may well be said that it is equally in the public interest that the lands formerly constituting the beds of the 150 other drained meandered lakes of the State should be used by the State for raising food for its citizens. The public good would certainly be served thereby as fully as, and more directly than, by the State leasing these lands for mere revenue.

Opinion section 12 (R. p. 35). State *v.* Evans there referred to (as shown by the language there quoted) simply held that a lease of land was not a "sale" of land under the constitutional restrictions requiring public bidding on a "sale" of State lands. The attempt to conclude from this that leasing is not an "alienation" of a proprietary right is contrary to all principle, and directly inconsistent with the District Court's judgment which was being affirmed, i. e. that the State could "dispose of the same (iron ore) by lease".

(See footnote 1 to the foregoing Statement as to jurisdiction, pages 29-30.)

Opinion section 14 (R. pp. 37). The conclusion here, that the *Hanford* case "upheld the State's title to lands improved and reclaimed from the water up to the point of navigation" is flatly contrary to the decision in that case. The quotation lifted from the opinion in that case must also be read in its full text. See Hanford *v.* St. Paul & Duluth R. Co., 43 Minn. 104, 116-7.

Opinion section 14 (R. pp. 37). *Shell* v. *Matteson*, 81 Minn. 38, here referred to involved only dried up lakes but *United States* v. *Holt State Bank*, 270 U. S. 49, and *Rooney* v. *County of Stearns*, 130 Minn. 176, involved with similar effect, drained lakes. The point of all of these cases and of the State drainage and other statutes (Appendix A) is to be found in their universal recognition that under the established rules of property in Minnesota the focal point of the State's rights is the waters and their common public use. Whenever they are properly removed the lot owner may freely exercise his remaining alienable, proprietary, beneficial rights and uses.

Opinion section 9 (R. p. 28). The references to the various earlier statutes which simply authorized the State to give mining leases on "state owned lands" do not of course carry the slightest implication that the beds of navigable waters belonged to the State in a proprietary capacity. Every decision to the time of this case is to the contrary. So also were the earlier Minnesota statutes on lake-bed lands and the drainage of lakes. (See Appendix A.) No attempt was ever made to lease lake-bed ores under such general leasing statutes. Even after the State sought to appropriate such ores by the 1909 statute the general statutes for the leasing of lands owned by the State were apparently considered to be inapplicable and the special 1917 statute for leasing lake-beds was passed and has finally been acted on and come to test in this case.

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APPENDIX C

Opinion of the District Court Accompanying Its Original Findings of Fact and Conclusions of Law, Dated April 8, 1946.

MEMORANDUM

The only material fact in dispute in this action is the navigability and public nature of Syracuse Lake at the time of Minnesota's admission to the Union. It is agreed that the classification of the lake as navigable or non-navigable is to be determined under the test set by the Federal courts. The following fairly recent statement of that test is found in United States *v.* Holt State Bank, 270 U. S. 49, 56:

> "The rule long since approved by this court in applying the constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted, in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flat-boats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce."

Tested by this standard the great preponderance of the evidence is that Syracuse Lake was navigable at the controlling date. It was actually used by Indians for travel and for transportation of furs and supplies by canoe. It was capable of use and subsequently used for floating and driving timber and forest products down the Embarras waters into St. Louis River. There is also a finding that the lake is a public body of water, as that term has been used in Minnesota cases, in describing the bodies of water over

which the State possesses the power of control in the public interest, accompanied by such interest as it may be held the State has in the underlying land. Syracuse Lake may be used for fishing, bathing and boating although the evidence does not show that its use for such purposes has been great. No large settlement of people was in its immediately vicinity, such as was on the shore of Longyear Lake in the *Korrer* case. Much better use could be made and has been made for those purposes of other parts of the Embarras chain of lakes and streams, notably Eshquagama and Embarras Lakes, which are nearer to range communities and better adapted for such uses. However, while the public use of these waters may be less than it was of Longyear Lake, the waters of Syracuse Lake are navigable and public waters.

The law governing ownership of land underlying navigable or public waters is in hopeless confusion. There has been dispute as to what were navigable waters; as to what the common law of England was; as to whether and to what extent such common law was applicable in the United States, and as to the relative interests of the United States and the States; and the rules and policies adopted by the various States differ greatly. What we are concerned with here primarily is what the Minnesota law is so far as applicable to this particular case. The court's views leading to the conclusions arrived at will be stated as briefly as possible without attempt to set forth a comprehensive discussion of the whole subject of the ownership of land under navigable waters.

Minnesota was admitted to the Union May 11, 1858. Syracuse Lake and the territory immediately surrounding it were included in the Northwest Territory ceded to the United States by Virginia. It is established that States which were in existence before the adoption of the Constitution did not by that instrument transfer their ownership of land underlying navigable waters to the Federal government, that patents issued by the Federal government of riparian lands embraced within the public domain did not pass title to the adjoining land under navigable waters, and

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that newly admitted States succeeded to the same rights as the original States.

"The shores of navigable waters, and the soil under them, were not granted by the Constitution to the United States, but were reserved to the states; and the new states have the same rights, sovereignty and jurisdiction over this subject as the original states."

Pollard's Lessee v. *Hagan*, 44 U. S. (3 How.) 212, 11 L. Ed. 565.

"Besides, it was settled long ago by this court, upon a consideration of the relative rights and powers of the federal and state governments under the Constitution, that lands underlying navigable waters within the several states belong to the respective states in virtue of their sovereignty and may be used and disposed of as they may direct, subject always to the rights of the public in such waters and to the paramount power of Congress to control their navigation so far as may be necessary for the regulation of commerce among the states and with foreign nations, and that each new state, upon its admission to the Union, become endowed with the same rights and powers in this regard as the older ones."

Scott v. *Lattig*, 227 U. S. 229, 242.

"Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from the sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself. See *Massachusetts v. New York*, 271 U. S. 65, 89. For that reason, upon the admision of a state to the Union, the title of the United States to lands underlying navigable waters within the states, passes to it, as incident to the transfer to the state of local sovereignty, and is subject only to the paramount power of the United States to control such water for

the purposes of navigation in interstate and foreign commerce."

United States v. *Oregon*, 295 U. S. 1, 14.

Such being the status of the title to the beds of navigable waters (whether rivers or lakes is immaterial in Minnesota) when Minnesota was admitted to the Union in 1858, and it being recognized that it was for the state to say what policies or rules should be adopted, what is the law now, and particularly with reference to the ownership and right of control of deposits of iron ore that may be in such submerged lands?

It is now practically undisputed that as to tidal waters, the states bordering on them have absolute ownership of the underlying soil and any valuable deposits in them. As between state governments and private interests the valuable oil reserves contained in the tidelands off the Pacific Coast are held to belong to the coastal states and much of the oil has been taken out under leases or contracts with the states. The same rule is established as to valuable rights in the land underlying waters on the Atlantic Coast and bays and inlets affected by the tide. If navigability in fact is the test, as the weight of authority seems to hold, there is no good reason for a distinction between tidelands and beds of interior fresh water lakes and streams. But logic has not always shaped the law on this subject.

When the issue of ownership of minerals in interior lake beds was presented to the Minnesota Supreme Court in the Korrer case, to be discussed hereafter, the law in the other states varied greatly. The courts of those states had dealt with the right to remove and dispose of marl, sand and gravel, stone, phosphate, and possibly some minerals, but not iron ore. The cases decided up to that time are collected and summarized in Judge Hallam's article hereinafter referred to. Throughout all the history of these judicial decisions and pertinent state legislation, one sees a steadily increasing tendency to emphasize and extend the public interest and to sustain the state's ownership and control for its own benefit of valuable substances found in submerged lands.

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Until 1909 there was no legislative declaration of policy in Minnesota. The courts had assumed to determine the question as it arose between private interests in controversies involving specific, concrete situations. At the outset there was an effort to determine what the common law of England was and to apply it so far as applicable. The preponderant view seems to be that under early common law fresh waters, above the flow and ebb of the tide, were treated as non-navigable whether navigable in fact or not and that riparian owners, at least on streams, owned to the middle of the stream. Lakes did not figure much in the discussion. But as time went on the Minnesota courts shifted from the position that the English common law should control. In Schurmeier *v.* St. Paul and Pacific R. Co., 10 Minn. 59 (82), a majority of the Supreme Court, going beyond the necessities of the case, expressed approval of the English common law as to the ownership of beds of fresh water streams, which was stated to be that the riparian owner owned to the middle of the stream, subject to the right of the state to regulate use of the water and underlying land in the interests of navigation. There followed through the years a series of decisions in which the emphasis was placed upon the element of navigability and the rights of riparians were discussed and decided with reference to that. In the course of time the concept of public interest and control was widened so as to embrace bodies of water which were suited for pleasure purposes, such as fishing, bathing and boating, regardless of navigability for commercial purposes. The public interest was held to be the same in those waters and the soil under them, although the authorities cited, particularly the early decisions of the United States Supreme Court, discussed the matter only from the standpoint of waters navigable for commercial purposes.

During this time no question arose in Minnesota as to the right to remove deposits of minerals or other valuable material from the beds of lakes or streams. Finally arose the controversy between private riparian owners, and their lessees, of lands on Longyear Lake, and the State, as to ownership, control and right to remove and dispose of iron ore under that lake, which was meandered and alleged and

found to be public and navigable. State *v.* Korrer, et al., 127 Minn. 60, 148 N.W. 617. The action was brought by the State to enjoin interference by defendants with the public waters of Longyear Lake and removal of iron ore by them from the soil underlying the lake in its natural condition. In the meantime Chapter 49, Laws of 1909, had been enacted. It declared the State's ownership of all minerals underlying meandered public lakes and rivers. This act, however, was not mentioned in the opinion in the Korrer case.

In the opinion the federal and state decisions were reviewed. Among the conclusions arrived at were these: the State upon its admission to the Union became the owner of land under navigable waters; this State has never conceded away its title as sovereign to the navigable waters or the soil under them; the law of the State is that the title of the riparian proprietor extends only to low-water mark; the title to the bed, below low-water mark, is held by the State, not in the sense of ordinary, absolute proprietorship with right of alienation, but in its sovereign, governmental capacity, for common public use and in trust for the people of the State for the public purposes for which they are adapted; the riparian owner has certain rights, below low-water mark, which are stated to be incident to the ownership of the shore land (which seems somewhat at variance with the holding in the Hanford case that such rights may be transferred and owned separately from the shore land) and subject to the public right, has exclusive right of possession and the entire beneficial interest in the surface of the underlying soil.

It was further stated that no decided case had ever sustained the title of the riparian owner to the minerals under public waters or the right to remove them under any circumstances, but that in most of the cases where the question had arisen as to the right to remove other substances the State was held to be the owner of the underlying soil in a proprietary capacity. It was then said that under the law in Minnesota the State owns the soil under public waters in a sovereign, not a proprietary, capacity, "but still the State owns it and the shore owner does not." The conclusions was that the State was entitled to an injunction restraining the defendants from taking ore below low-water

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mark. It is important to note, in this connection, that the trial court, in its memorandum, stated that if the claim of interference with the public use was made, it could not be sustained, but that no claim was made by the State that threats of interference with such public use had been made, or that such danger was impending. So the decision of the Supreme Court, which did not express a contrary conclusion of fact, could not have been based upon the ground that removal of the ore would interfere with or diminish the public use of the lake.

Upon petition for re-hearing and for further directions to be given the trial court so that proper judgment might be entered, it appeared that pursuant to stipulation and order of court some ore had been removed from below low-water mark on condition that the operating defendant should pay the state 60 cents per ton for ore that it might remove and which it should be finally decided did not belong to the shore owners, or, as stated in the order, "for which under the final determination of the court in the action it is under no obligation to pay royalties to the fee owners or those claiming under them." Evidently the court was divided as to the effect of the stipulation and order, but it was said that a majority construed the stipulation as giving the State the right to an accounting only in the event the State was found to be the owner in a proprietary capacity of the minerals underlying the lake; therefore, as the court had, in the main opinion, held that the State did not hold the mineral in a proprietary capacity, but in its sovereign capacity, the State had no right to recover the value of the ore that had been removed from below low-water mark.

Certainly this final disposition of the Korrer case, resting as it does upon a disputed interpretation of the stipulation in question, does not leave the law in that state of clarity that might be desired. It is argued with much force that if the State does not own the ore in a proprietary capacity and the value of it was awarded to the riparian owner, it must have been intended to imply that the riparian owner owns the ore under the lake. However, I do not agree with that contention. Such construction of the per curiam opinion would run counter to much that was stated to be the law in the first opinion.

Judge Hallam, who wrote the original opinion for the court in the Korrer case in 1914, in an article on the subject of "Ownership of Realty Under Water" published in the Minnesota Law Review in January, 1917, and before enactment of Chap. 110, Laws of 1917, in reviewing numerous decisions dealing with various phases of the subject of his article, said, referring to the Korrer case, "The right of the State itself to take ore from the lake bed, the power of the State to give to the riparian owner or anyone else the right to do so, the right of the riparian owner to take ore from the lake bed if it could be done without disturbing the waters or the public use thereof, and the ownership of the ore in fact taken out, were questions the court did not decide." Of course, he was not then speaking for the court, but his interpretation of the Korrer decision is interesting, and, I think, significant.

In the same article Judge Hallam said: "In Minnesota, where it is held that the title is in the State in its sovereign capacity, the doctrine that the State has any title which it may convey is repudiated," and then quotes from Bradshaw *v.* Duluth Imperial Mill Co.; "It is the settled law with us that the rights of the State in navigable waters and their beds are sovereign, and not proprietary, and are held in trust for the public as a highway, and are incapable of alienation."

Our Supreme Court has held that the ordinary mining lease, whose pattern the state lease to the bed of Syracuse Lake follows, is not a sale of the land or any part of it. State *v.* Evans, 99 Minn. 220. That case, it seems to me, is very pertinent here. It involved a state contract and mineral lease of state swamp lands, which, by constitutional provision, could not, nor any part of it, be sold except at public sale. This lease was not sold at public sale. It was claimed that the lease and contract were in effect a sale of the ore in place. This view was rejected. It was held that there was no constitutional bar to the State itself developing and mining ore deposits in state swamp lands and that it might accomplish the same object by contracting with private individuals to mine and remove the ore upon payment of agreed royalties. It seems to me that the purport of our court decisions is that the interest of the State in

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the beds of navigable waters is such that even though it does not own the submerged land in the sense of ordinary, absolute proprietorship with the right of alienation, it does have the right to contract for development of the resources contained in the submerged lands in the manner provided for by Chap. 110, Laws 1917.

That law provides for entering into contracts, by the governor, attorney general and auditor on behalf of the State, with private parties, for the mining and disposal of the iron ore situate under the waters of any public lake or river in the state, that such contracts may provide for the drainage of such lake or river or the diversion of the waters to new channels, and that the principal of all funds arising from the disposal of such iron ore shall be added to the permanent school fund of the State. This implements the policy contained in Chap. 49, Laws of 1909, in a manner designed to execute the trust under which the submerged lands are held and negatives any right of the riparian owner to the minerals.

Assuming that the State, upon admission to the Union, became the owner of the beds of navigable or public waters, with power to control them as the proper state authority should deem best in the public interest, I see no insuperable bar to the adoption of such policy as is contained in the 1909 and 1917 acts, unless it be private property rights which had become vested before the enactment of those laws. Assuming that in the absence of legislative enactment the courts had to declare what the law was, the previous judicial decisions had not specifically upheld the riparian owner's right to take out minerals such as iron ore. If such right could be spelled out of those decisions it was only from general language attempting to define the relative rights of the State and the riparian owner. The question was first specifically presented in the Korrer case, after the enactment of Chap. 49, Laws of 1909, and, for reasons already stated, that decision is not thought to sustain the claim which the defendants are now making to the ore under Syracuse Lake.

I am of the opinion, therefore, that the State, by virtue of its lease to Van Derlip, which is now held by the defendant Lake Mining Co., is entitled to the royalties called for

by that lease on the ore removed from underneath Syracuse Lake.

No detailed findings have been made as to the separate ownerships of the various defendants nor on some of the other matters mentioned in the pleadings. Those things are immaterial if the conclusion expressed in the decision now made is correct. If it is determined upon appeal that it is not correct, I understand the parties will have no difficulty in working out the question of ownership; if they cannot do so, application can be made to the court for additional findings.

APPENDIX D

Opinion of the District Court Accompanying Its Order Amending Its Original Findings of Fact and Conclusions of Law, on Motion by the Various Parties to the Cause, Dated July 12, 1946.

MEMORANDUM

The clause which the plaintiff asked to have inserted in the findings of fact and conclusion of law, to the effect that the State was lawfully entitled to make the lease to Van Derlip dated July 18, 1918, contains a pure conclusion of law. It is in accord with the facts found and the rest of the original conclusion of law, so I cannot see any objection to it. The additional matter requested by the State includes a finding that the riparian owners had no interest in the lake bed, below low water mark. I do not agree with that contention. The Minnesota cases recognize that they do have an interest, but make it subordinate to the interests of the State as I have found them to be. I did not think it necessary to define such rights or interest of the riparian owners more specifically.

The pleadings do not seem to call for a finding or conclusion that the State is entitled to receive from the Lake Mining Company the royalties provided for by the Van Derlip lease, although that would seem to be necessarily the result of the rest of the court's decision. The motion

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of the Lake Company to have such part of the decision stricken out is therefore granted. When the issues raised by the pleadings are finally settled, there is not likely to be any controversy about the right to royalties.

The motion of the North Star Company and another group of defendants to have the second finding of fact amended so as to show that Syracuse Lake does not now exist is granted. The amended finding, and the facts appearing elsewhere, that the drainage of the lake was brought about pursuant to an arrangement with the Great Northern by which the latter relinquished any claim which it might have as a riparian owner to a part of the ore, and that the drainage was accompanied by the assertion by the State of its right to grant a lease for the mining and removal of the ore, and that the contract with the Great Northern provided for restoration of the waters to the former lake site upon demand of the State, present the true situation. Also, I think the preponderance of the evidence sustains the requested substitution of the proposed paragraph 10 of the findings of fact, with the exception of the deleted portion to the effect that the artificial channel is more suitable and useful than the natural one.

The other proposed changes in the findings of fact and conclusion of law call for a reversal of the court's position as expressed in the original decision and which is now adhered to.

The oral argument and written memorandum submitted by counsel for certain of the riparian owners upon the hearing of the motions now disposed of present forcefully and in manner of treatment somewhat different from that contained in the original briefs, the contention that the State's interest in the beds of navigable waters is, or should be, limited to what is necessary to effectuate its recognized right and duty to regulate, maintain and control the water for public navigation and other public uses. I think that may well have been the better public policy. But I am influenced by the fact that controlling judicial decision seems to have established the rule that the State, upon admission to the Union, was empowered to establish what policy should be followed, and by the thought that judicial decision prior

thereto was not a bar to the action which the Minnesota legislature took in enacting the legislation in 1909 and 1917 which has heretofore been discussed.

The bearing which the Evans case (99 Minn. 220) might have on the question involved in the present case was not suggested by any of the parties before submission of the case, as I remember it. Counsel now take issue with the court as to the effect of that decision. This court construed that decision as holding that the ordinary mining lease was not a sale or alienation of the land or any part of it and therefore the granting of the Van Derlip lease by the State was not an alienation which would characterize the State's interest as proprietary "in the sense of ordinary absolute proprietorship with the right of alienation" (State *v.* Korrer, 127 Minn. 60, 78). Cases are cited in the new memorandum as authority for the contention that a lease such as is here involved is an alienation of property. Whatever their purport, and particularly that of the Minnesota case cited (Bacon *v.* Mirau, 148 Minn. 268), they do not seem to have been understood as overruling or changing the rule laid down in the Evans case. And I do not understand that subsequent application of that rule in this State has been limited by the fact that the Evans case dealt with State swamp land which the State owned in absolute proprietorship. The constitutional provision was that such land could not be sold except by following a specified precedure. That procedure had not been followed. It was held, nevertheless, that the lease was good because it was not a sale of the land or any interest in it.

It does not seem to me that anything is to be gained by further analysis or discussion of the Korrer case. I do think that the court's opinion is not satisfactory and does not leave clear what the ultimate holding of the Supreme Court will be. It seems likely that that accounts for Judge Hallam's article in the Minnesota Law Review. Counsel seem to intimate that the opinion of the court, written by Judge Hallam, reflects some of the latter's own personal views as to what the State's interest should be, rather than those of the court. If that is so, then his subsequent Law Review article would seem to be significant.

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APPENDIX E

Original Opinion of the Supreme Court of Minnesota, Dated August 8, 1947

34336

STATE OF MINNESOTA, *Respondent*,

v.

LONGYEAR HOLDING CO., et al., *Defendants*,

NORTH STAR MINING COMPANY OF WEST VIRGINIA, et al., *Appellants*

Endorsed: Filed August 8, 1947. Grace Kaercher Davis, clerk Minnesota Supreme Court.

SYLLABUS

1. The test of navigability to fix ownership of lake beds must be determined as of the date of a state's admission to the Union and under the federal decisions with reference thereto.

2. Under federal authorities, streams or lakes which are navigable in fact are regarded as navigable in law. They are navigable in fact when they are used, or are susceptible of use, in their ordinary, and natural condition, as highways for commerce, whether by steamboats, sailing vessels, or flatboats, and even though occasional difficulties are encountered in connection therewith.

3. Under decisions of the United States Supreme Court, the capability of use for transportation and commerce by the public rather than the manner and extent thereof affords the true criteria of navigability of waters. Thereunder, a watercourse may be navigable notwithstanding serious obstructions occasioned by natural barriers and even though artificial aids are required before commercial navigation may be undertaken. The uses and purposes to which such waters may be put to meet the test of navigability vary from the carrying of ocean liners to the floating out of logs.

4. Evidence submitted *held* ample to sustain trial court's finding that Syracuse Lake, here involved, was part of a navigable watercourse at time of Minnesota's admission to statehood.

5. Upon admission of a state to the Union, title to the beds of all navigable waters therein remains in the State, the Federal Government taking no title or interest therein except under its power to regulate commerce between the states.

6. The riparian owners here, holding title to lands bordering on Syracuse Lake under patents from the United States, did not, by virtue thereof, acquire any title to the bed of said lake below low-water mark. Under decisions of this court, it is equally well settled that such riparian owners did not acquire any right or beneficial interest in and to the bed of said lake by any rule of property established here, other than the ordinary riparian rights of navigation, dockage, wharfage, and similar privileges, or those contingent rights or privileges dependent upon the doctrine of accretions and relictions.

7. The sudden and artificial drainage of the lake under authority of the State for a temporary period, during which a substitute channel is provided for, the purpose of removing ore beneath the lake bed, does not constitute a reliction so as to vest title to the lake bed thus uncovered in the riparian owners.

8. Before a riparian owner can claim title to lands as a result of relictions, it must be clear that such reliction is of a permanent nature, without the possibility of water again filling in or covering the relicted area.

9. The legislature has at no time by grant or legislative enactment divested the State of its title in and to the lake bed in question. On the contrary, legislative enactments have consistently and constantly manifested a legislative intent that title to such lands and the mineral deposits therein shall remain in the State.

10. Subsequent to the revolution, the people of each state became sovereign and in that character held absolute title

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to their navigable waters and the soils under them; Minnesota, upon admission to statehood, retained and reserved unto itself the same rights and privileges which were retained and reserved by the original thirteen colonies at the time the Federal Government was established. Subsequent decisions of the United States Supreme Court and of this court have indicated that such title is sovereign or governmental rather than proprietary, and thereby is meant only that such title was acquired by virtue of the sovereignty of the people and hence is held in trust for the people for the purposes of navigation and other public uses. In the exercise of such trust, however, it has never been held that the State may not dispose of partial interests in such lands in the interest of all the people of the State, provided the primary purposes of the trust are not unduly abridged or burdened thereby.

11. Minnesota decisions in general are in accord with the common-law principles enunciated by the United States Supreme Court as herein set forth.

12. In the exercise of its trust, while the State may not parcel or alienate such lands or otherwise interfere with the public purposes of the trust, in which they are held, it has the power and duty to use such lands for the greatest public good and, where they can be put to productive use, not to permit them to lie waste and unproductive. The State, under proper statutory authority, may execute leases to private individuals whereunder they may remove ore from the beds of navigable waters, paying the State a royalty in connection therewith. Such leases do not constitute a sale or alienation of the lands in question.

13. Decisions of other states which apply the trust doctrine to state ownership of lands under navigable waters, as does Minnesota, recognize the right of the State under statutory authority to remove from such lands minerals, oil, and other like products.

14-15. Authorities relied upon by defendants are not in conflict with the principles expressed herein.

16. United States *v.* California, . . . U. S. . . ., decided June 23, 1947, upholds doctrines above set forth insofar as they relate to inland navigable waters and lands under the same.

17. Authorities cited clearly establish that the State under proper legislative authority (conferred here by L. 1917, c. 110) may provide for removal of ore beneath beds of its navigable waters. Such removal is consistent with its sovereign title as defined by the common law in existence at the time it was admitted to statehood and in subsequent interpretations thereof both by the United States Supreme Court and by this court. It is consistent with the State's duty as trustee to exercise its trust for the greatest good of all the people and not to permit the lands to lie waste and unproductive.

Affirmed.

OPINION

THOMAS GALLAGHER, *Justice.*

Action by the State to determine adverse claims to the bed of Syracuse Lake, situated in sections 5 and 6, township 58 north, range 15 west, St. Louis County, Minnesota. The action involves only that portion of the bed of the lake below low-water mark, comprising approximately 33 acres, in which there are valuable iron ore deposits.

Defendants other than Lake Mining Company, which is operating under lease from the State, are the owners of all interests in the land bordering on said lake. For brevity, they are hereinafter referred to as the riparian owners.

Some 20 million tons of ore are involved, of which approximately 18 million tons lie under the lands bordering the lake to the low-water mark thereof and of which approximately two million tons lie under the lake bed below said low-water mark. It is the ownership of the latter which is involved in this action.

The State has entered into an agreement under statutory authority whereunder the lake has been drained, a temporary channel connecting the waters above and below it constructed, overburden removed, and the mining of the ore

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deposits beneath the lake bed below its low-water mark commenced. Such operations have been undertaken and conducted under separate agreements with the riparian owners, so that the ore beenath their lands bordering said lake may be removed at the same time. All such operations are being conducted by Lake Mining Company under agreements with the riparian owners and with the State, whereunder specified royalties upon the ore removed from below said portion of the lake bed are to be paid to the lawful owners thereof as judicially determined, and whereunder, if required by the State, said lake is to be refilled and its channel restored when such operations are complete.

The trial court made findings and ordered judgment in favor of the State, in substance determining that Syracuse Lake at the time of Minnesota's admission to the Union was part of a navigable highway extending from the mouth of the St. Louis River to Lake of the Woods; hence, that the State retained or reserved title to the bed thereof below low-water mark and now holds the same in its sovereign governmental capacity in trust for the people of the State, although not in absolute proprietorship with right of alienation; that the State is the owner of iron ores and other minerals on, in, or below said low-water mark of the lake, with the right to dispose of the same by lease, subject only to the prior lease and agreement held by Lake Mining Company, hereinbefore described; and that none of the riparian owners are entitled to receive or be paid any royalties or other compensation for the ore removed from said portion of the lake bed.

The only fact issue presented at the trial was whether Syracuse Lake was a navigable public lake within the federal tests of navigability at the time of Minnesota's admission to statehood, so that title to the bed thereof remained in the State upon such admission. The remaining issues were issues of law. The trial court found that Syracuse Lake was a navigable public lake within the federal tests of navigability at the time of Minnesota's admission to statehood, and, in our opinion, as will hereinafter be shown, the evidence amply sustained the trial court's findings in this respect.

In their written briefs and oral arguments, the riparian owners do not seriously question the sufficiency of the evidence to sustain this finding. It is their principal contention here, as it was at the trial, that even though at the time of Minnesota's admission Syracuse Lake was part of a navigable waterway, nevertheless, *under the decisions of this court* rendered subsequent thereto, the State's title therein was thereafter limited to that of sovereign and governmental rather than proprietary; while their interests in said lake bed, *under our decisions*, were held to be proprietary and beneficial, subject only to the State's sovereign or governmental right therein; and that, since the State has effected the diversion of the waters of said lake and provided a new channel in lieu thereof, its sovereign right to the lake bed no longer attaches thereto, and they alone, as holders of the proprietary interests therein, are now the lawful owners of the ore beneath the same.

The riparian owners acquired their original rights in the premises adjoining said lake by virtue of patents from the United States issued to them or their assignors or predecessors in interest. It is not disputed that if Syracuse Lake was a part of a navigable watercourse at the time of Minnesota's admission to statehood, title to the bed thereof, as well as to the bed of other navigable lakes and streams within the State, remained in the State and did not pass to the Federal Government, and that in consequence patents from the United States covering lands riparian thereto conveyed to the grantees therein no interest in the beds of such waters.

It would follow therefrom that any rights of riparian owners therein must arise by virtue of some action or proceeding taken subsequent to Minnesota's admission to statehood which divested or limited the State's beneficial interest in such lands and vested the same in the riparian owners. As stated above, the riparian owners assert that such transfer of beneficial ownership was effected by the *decisions of this court* subsequent to statehood. These, they assert, established a rule of property which divested the State of any beneficial or proprietary ownership in the beds under navigable waters and vested the same in them, effec-

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tive when the State's sovereign interest therein terminated as the result of the accretions and relictions, or by the complete drainage and diversion of such waters to a new channel, as in the instant case.

It is the contention of such riparian owners that the rule of property thus asserted is established in Union Depot, St. Ry. & Tr. Co. *v.* Brunswick, 31 Minn. 297, 17 N. W. 626; Hanford *v.* St. Paul & Duluth R. Co., 43 Minn. 104, 42 N. W. 596, 44 N. W. 1144; Shell *v.* Matteson, 81 Minn. 38, 83 N. W. 491; and State *v.* Korrer, 127 Minn. 60, 148 N. W. 617, 1095.

The State, on the other hand, contends that Syracuse Lake was part of a navigable waterway at the time of Minnesota's admission to the Union, and hence that title to the bed of the lake below the low-water mark was reserved to the State at such time and subsequent thereto; that such title so reserved, while designated at times as governmental or sovereign, nevertheless gave the State the full beneficial right, title and interest in and to the bed of the lake below low-water mark; that decisions defining the State's rights in the beds of navigable waters as governmental or sovereign rather than proprietary mean only that the State cannot parcel and sell or otherwise alienate such water beds so as to interfere with commerce or the navigability thereof, but that it holds the same in trust for all the people for public navigation; that no decision of this court and no legislative enactment ever vested the beneficial title or ownership of said water bed in the riparian owners; that legislation alone, rather than judicial decisions, could effect such a transfer of State lands; and that the legislature, by repeated enactments, has expressly declared that the State is the beneficial owner thereof.

The State further asserts that its actions in authorizing the temporary drainage of Syracuse Lake and the removal of ore beneath it under the leases described, taken pursuant to statutory authority, did not constitute the parceling and sale or alienation of said lands in violation of its sovereign or governmental title; or in violation of the trust in which it held such lands for the people, since (a) such actions did not interfere with the public right of navigation, and (b) they were in conformity with the State's duty, as trustee,

to put such lands to their greatest productive and beneficial use for the benefit of all the people.

As previously stated, the trial court's findings and conclusions upheld the position of the State as above set forth.

1. It is well settled that the test of navigability to fix ownership of lake beds must be determined as of the date of a state's admission to the Union and under the federal decisions with reference thereto. United States *v.* Utah, 283 U. S. 64, 75; United States *v.* Appalachian Elec. Power Co., 311 U. S. 377, 408; Union Depot St. Ry. & Tr. Co. *v.* Brunswick, 31 Minn. 297, 17 N. W. 626; United States *v.* Holt State Bank, 270 U. S. 49.

2. The federal test of navigability, as laid down by the United States Supreme Court, is stated in United States *v.* Holt State Bank, *supra,* as follows (270 U. S. 56):

> "The rule long since approved by this court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce."

3. Thus, at various times the United States Supreme Court has stated: (1) that the capability of use rather than the extent or manner thereof by the public for transportation and commerce affords the true criteria of navigability of waters, United States *v.* Holt State Bank, *supra;* (2) that a watercourse may be navigable notwithstanding serious obstructions occasioned by natural barriers such as rapids and sand bars, *The Montello,* 87 U. S. (Wall.) 430,

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439; (3) that the true test of navigability of waters does not depend upon the mode in which the commerce thereon is conducted or the difficulties attending it, United States *v.* Utah, 283 U. S. 64, 76 *supra;* (4) that the uses and purposes to which waters may be put to meet the test of navigability vary from the carrying of ocean liners to the floating out of logs, United States *v.* Appalachian Elec. Power Co., 311 U. S. 377, 405, *supra;* (5) that the density of traffic on waters may vary widely, but the tests must take these variations into account, United States *v.* Appalachian Elec. Power Co., *supra,* at p. 405; (6) that a waterway otherwise suitable for navigation is not barred from that classification merely because artificial aids are required before commercial navigation may be undertaken, United States *v.* Appalachian Elec. Power Co., *supra,* at p. 407; (7) that, once a waterway is determined to be navigable, it remains so, United States *v.* Appalachian Elec. Power Co., *supra,* at p. 408; Economy Light & Power Co., *v.* United States, 256 U. S. 113, 123; (8) that temporary abandonment or disuse of a waterway as a highway of commerce does not terminate its navigable status, since subsequent improvements may restore its usefulness, Economy Light & Power Co. *v.* United States, *supra,* at p. 124; and (9) that artificial obstructions such as lumber and dams which may be abated by exercise of public authority do not prevent a stream from being navigable in law. Economy Light & Power Co. *v.* United States, *supra.*

The language of the Appalachian case appears particularly applicable here. Therein the court stated (311 U. S. 416):

> "Use of a stream long abandoned by water commerce is difficult to prove by abundant evidence. Fourteen authenticated instances of use in a century and a half by explorers and trappers, coupled with general historical references to the river as a water route for the early fur traders and their supplies in pirogues and Durham or flatbottomed craft similar to the keelboats of the New, sufficed upon that phase in the case of the DesPlaines. Nor is lack of commercial traffic a bar to a conclusion of navigability where personal or private

use by boats demonstrates the availability of the stream for the simpler types of commercial navigation."

4. Under the foregoing tests and decisions, it cannot be seriously disputed that the evidence submitted at the trial herein is sufficient to sustain the trial court's finding that Syracuse Lake at the time of Minnesota's admission to statehood was part of a navigable waterway.

Such evidence clearly established that Syracuse Lake and other connecting lakes were in reality widenings of the Embarrass River; that for many years prior to Minnesota's admission to statehood they were part of a route, used by Indian trappers and by individual fur traders, as well as agents of the Northwest Fur Company and later the American Fur Company, extending from the mouth of the St. Louis River at Lake Superior up said river to the Embarrass River; up the Embarrass River, Embarrass Lake, Syracuse Lake, Wine Lake and Sabin Lake; thence via portage to Pike River; thence down Pike and Vermillion Rivers into Lake Vermillion; thence by other waters into Rainy Lake and Lake of the Woods. The trial court further found that prior to and since statehood such route was used by Indians for travel and for transportation of furs, fish and supplies by canoe, and by timber and lumber interests for moving down forest products and floating down logs.

The evidence submitted to establish the foregoing included:

(1) Excerpts from House Executive Document No. 451 of the 25th Congress, Second Session, a message from President Van Buren, dated July 2, 1838, to the House of Representatives, transmitting to the latter a report of the secretary of state relative to the proceedings of the commissioners appointed by the United States and Great Britan under the seventh article of the Treaty of Ghent, to fix and determine the boundary between the United States and the possessions of Great Britain in North America, from the foot of Neebish Rapids to the northwesternmost point of Lake of the Woods; which excerpts included certain exhibits and

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statements presented to and considered by said commissioners in making their determination, as follows:

(a) A letter from one William McGillivray, described as "the best living authority on this subject" (the northwest trade routes), to John Hale, British agent to the commission, dated September 4, 1824 describing the water route, including Syracuse Lake here under consideration, as follows:

"• • • There is, however, another route of communication with the interior from Lake Superior, and the one which should have been fixed upon as the boundary line at the time of making the Treaty of Paris. Into the west bay of Lake Superior, known by the name of Fond du Lac, falls the river St. Louis, by far the largest stream which that lake receives into its bosom. By this river, and in its vicinity, there is a route to the interior county (to Lake La Pluie and the Lake of the Woods); it was practiced from the year 1796 by the Northwest Company, until that country was given up to the Americans, in consequence of the Treaty of Ghent, and has since that time been constantly used by the American Fur Company."

(b) An affidavit of one Samuel Thompson, an assistant surveyor to the commission, dated June 7, 1827, who surveyed the St. Louis River and who described the route by the St. Louis as having 21 carrying places;

(c) An affidvait of one David Thompson, described as "a partner of the Northwest Company" who "remained in • • • the Northwest for sixteen years, surveying, taking observations, and studying to acquire a perfect information of the country, between 1794 and 1812." Again subsequent to 1816, he explored for several years those parts of the Northwest. In his affidavit, dated June 3, 1827, he described the route as follows:

"• • • along the whole circuit of Lake Superior, this river (the St. Louis) has no parallel, for being navigable • • •."

(d) Ancient maps, outlining the trade route via the St. Louis and Embarrass Rivers, which included Syracuse Lake although thereon it was shown as merely a widening of the river;

(2) Testimony of Dr. Grace Lee Nute, curator of Minnesota manuscripts of the Minnesota Historical Society, whose research embraced ancient documents, maps, and records relating to this part of Minnesota. Included therein were records of the Hudson Bay Company in London, the Northwest Company in London and Edinburgh, the old French fur traders in Paris and Montreal, and various records of the American Fur Company. Based upon such research, Dr. Nute testified that Syracuse Lake was part of a well-recognized route of the fur trade, extensively used for many years prior to Minnesota admission to statehood;

(3) Testimony of Joe Boshey, an Indian 95 years of age, who testified, through an interpreter, as to his own recollections of the operations of the fur traders, from Lake Vermillion to the mouth of the St. Louis River, by canoe over the portages and through the bodies of waters here involved. His recollections went back to construction of the Vermillion trail sometime prior to 1864. He testified further that he was familiar with the hauling of furs down the route, and with return trips wherein the traders carried supplies over the same.

(4) Testimony of Harold Allan Lever and Oscar Irvin Buckmaster, chief engineer and district appraiser, respectively, for the division of lands and minerals of the Minnesota conservation department, who had recently examined this route and the portages in connection therewith and who testified that evidence of portages between the bodies of water described still existed, although now overgrown with weeds and foliage; and almost obscured from sight;

(5) Ancient maps and surveys made prior to Minnesota's admission to statehood, clearly indicating the trade route here involved and establishing Syracuse Lake as a part thereof.

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It is clear that the evidence outlined above was ample to sustain the trial court's finding that Syracuse Lake was part of a navigable waterway at the time of Minnesota's admission to statehood.

5. It is conceded that upon admission of a state to the Union title to the beds of all navigable waters therein remains in the State, the Federal Government taking no title or interest therein except under its power to regulate commerce between the states. Pollard *v.* Hagan, 44 U. S. (How.) 212; Shively *v.* Bowlby, 152 U. S. 1; Scott *v.* Lattig, 227 U. S. 229.

6. It follows, and is likewise conceded, that the riparian owners here acquired no title to the bed of Syracuse Lake below low-water mark by virtue of the patents issued to them or their predecessors by the United States covering lands adjoining this navigable lake. Under the decisions of this court, it seems equally clear that they did not acquire any right or *beneficial* interest in and to the bed of this lake, other than (1) the ordinary riparian rights of navigation, dockage, wharfage and similar privileges, or (2) those contingent rights or privileges resulting from the doctrine of *accretions and relictions.*

In Union Depot, St. Ry. & Tr. Co. *v.* Brunswick, 31 Minn. 301, 17 N. W. 628, *supra,* Mr. Justice Mitchell, speaking for this court, stated these governing principles as follows:

> "In this state it is the settled doctrine that the riparian owner has the fee to low-water mark. • • • But while he only has the fee to low-water mark, he has certain riparian rights incident to the ownership of real estate bordering upon a navigable stream. Among these are the right to enjoy free communication between his abutting premises and the navigable channel of the river, to build and maintain suitable landings, piers, and wharves, on and in front of his land, and to extend the same therefrom into the river *to the point of navigability, even beyond low-water mark, and, to this extent exclusively to occupy for such and like purposes the bed of the stream,* subordinate only to the

paramount public right of navigation. • • • These riparian rights are property, and cannot be taken away without paying just compensation therefor." (Italics supplied.)

In Lamprey *v.* State, 52 Minn. 181, 198, 53 N. W. 1139, 1143, Mr. Justice Mitchell again stated:

"• • • where the lake is navigable in fact, its waters and bed belong to the State, in its sovereign capacity, and • • • *the riparian patentee takes the fee only to the water's edge,* but with all the rights incident to riparian ownership on navigable waters, including the right to accretions or relictions formed or produced in front of his land by the action or recession of the water. Of course, it is a familiar principle that *these riparian rights rest upon title to the bank or shore, and not upon title to the soil under the water.*" (Italics supplied.)

In Hanford *v.* St. Paul & Duluth R. Co., 43 Minn. 104, 112, 117, 42 N. W. 596, 44 N. W. 1144, 1145, 1147, the question involved was whether riparian rights might be alienated from the land and separately transferred. Therein the court summarized such rights as follows:

"• • • Subject only to the limitation that he shall not interfere with the public right of navigation, he has the unquestionable and *exclusive* right to construct and maintain suitable landings, piers, and wharves into the water, and *up to the point of navigability* (italics supplied), for his own private use and benefit. • • • And it is obviously immaterial, if the public interests be not prejudiced, whether the submerged land be covered with wharves of timber or stone, or be reclaimed from the water by filling in with earth so that it becomes dry land. The land may be so reclaimed. • • •

"This private right of use and enjoyment is not, we think, limited to purposes connected with the actual use of the navigable water, but may extend to any purpose not inconsistent with the public right.

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"• • • we do not wish to be understood as assenting to the proposition that the title of the State may be thus transferred by acts of the riparian proprietor which the State has no particular reason at the time for opposing. It may be doubtful whether the title does not remain unchanged, and whether if, in the future, it should become necessary for the State to broaden the navigable channel so as to embrace the reclaimed land, it would not have the right to do so."

In Petraborg *v.* Zontelli, 217 Minn. 536, 547, 15 N. W. (2d) 174, 180, we defined the rights of riparian owners as follows:

"'• • • The extent of the property right is well expressed in Warder *v.* Springfield (9 Ohio Dec. (Reprints)), where it is said that no riparian proprietor owns an integral part of, or has absolute property in, the waters of a stream, but each has only the use of their flow past his lands for ordinary domestic, manufacturing, and other lawful purposes. • • • *The property, therefore, consists, not in the water itself, but in the added value which the stream gives to the land through which it flows.'* • • • True, the riparian owner takes only to the water line, but he may deny access to and from the water at his particular property; he may build piers and wharves from his land out of navigable waters; he has an exclusive right of access to the lake • • •; and he may claim accretions and relictions caused by changes in the current or flow of the water."

Finally, in State *v.* Korrer, 127 Minn. 60, 72, 148 N. W. 617, 622, 1095, *supra,* wherein the court specifically denied the right of riparian owners to mine ore beneath the bed of a navigable lake, it stated:

"• • • While the Minnesota cases recognize the right to use the bed of the stream or lake for purposes not connected with the actual use of the water, we know of no case in Minnesota or elsewhere where the right of

the riparian proprietor has been recognized as possessing the right of utilizing the bed of a public body of water below low-water mark for purely private purposes disconnected with the use of the water, to the extent of destroying its existence, and against the protest of the State.

"It may be noted that no decided case has ever sustained the title of the riparian owner to the minerals under public waters or the right to remove them under any circumstances. * * * Under the law of this State the State owns the soil under public waters in a sovereign not a proprietary capacity, *but still the State owns it and the shore owner does not.*" (Italics supplied.)

Under the foregoing Minnesota decisions, it is clear that the riparian owners here can claim no title whatsoever to the bed under Syracuse Lake unless the State by legislative grant has relinquished its title to the riparian owners or unless they have gained a portion thereof as the result of accretions or relictions. (There is no contention here by the riparian owners that the State either by legislative grant or by act of grace has ever relinquished to them its title to the bed of Syracuse Lake.)

7. Under the doctrine of accretions and relictions, where applicable, it is universally held that riparian owners gain a vested right in property added to their riparian lands as a result of deposits from the waters or because of their recession. Here, there is no claim that land has been added as a result of accretions. As to relictions, the evidence is undisputed that until the time of its drainage by the State, Syracuse Lake maintained a fairly constant level. Accordingly, the only possible claim based upon reliction must rest upon the theory that temporary drainage of the lake pursuant to statutory power constituted a reliction, vesting the riparian owners with full title to the lands in question.

The drainage of the lake here was sudden and artificial, accomplished through the agency and authority of the State. It is of a temporary nature, and the evidence discloses that as soon as the drainage pumps cease the lake will again fill

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up. Under the lease, the lessee, defendant, Lake Mining Company, if required by the State, is obliged to return the water to the lake and reconnect and restore the prior channel as soon as the temporary purposes authorized by the lease have been completed. Under such circumstances, the doctrine of relictions would appear to have no application.

1 Cooley's Blackstone (3 ed.), Book II, p. 260, states the doctrine of relictions as follows:

> "And as to lands gained from the sea, either by *alluvion*, by the washing up of sand and earth, so as in time to make *terra firma;* or by *dereliction*, as when the sea shrinks back below the usual water mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. • • • But if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king; for as the king is Lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry."

The courts of many states have upheld the principles thus enunciated. See Noyes *v.* Collins, 92 Iowa 566, 61 N. W. 250, 26 L. R. A. 609; Gill *v.* Lydick, 40 Neb. 508, 59 N. W. 104; Luscher *v.* Reynolds, 153 Ore. 625, 56 P. (2d) 1158; Martin *v.* Busch, 93 Fla. 535, 112 So. 274. Minnesota has not had occasion to pass upon this issue but has recognized the principle expressed in 1 Cooley's Blackstone, *supra,* in Lamprey *v.* State, 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, *supra,* and in Hanson *v.* Rice, 88 Minn. 273, 92 N. W. 982.

8. It is also clear that before a riparian owner can claim title to lands as a result of relictions, *such reliction must be of a permanent nature,* without the possibility of the water again filling in or covering the relicted area. As stated in Troska *v.* Brecht, 140 Minn. 233, 167 N. W. 1042, involving a lake which had dried up temporarily but had subsequently again filled in (140 Minn. 239, 167 N. W. 1044):

> "• • • But the lake again filled up from natural causes in 1902, and has remained substantially in its

original condition ever since. The lake did not lose its character as a meandered lake by a mere temporary recession of its waters; to have that effect the recession must be permanent."

See, also, State *v.* Thompson, 134 Iowa 25, 111 N. W. 328; Anderson *v.* Ray, 37 S. D. 17, 156 N. W. 591; Flisrand *v.* Madson, 35 S. D. 457, 152 N. W. 796; Sapp *v.* Frazier, 51 La. Ann. 1718, 26 So. 378, 72 A. S. R. 493.

Based upon the foregoing authorities, it follows that in the instant case the riparian owners cannot rest their claims on the doctrine of accretions and relictions.

9. It is equally clear that there has been no legislative enactment or grant vesting these shore owners with any interest in the portion of the lake bed involved. On the contrary, the acts of the legislature with reference thereto have been exactly to the opposite effect. It has consistently and constantly affirmed the right of the State to ore lands under the beds of navigable lakes and streams. Thus, L. 1889, c. 22, authorized the commissioner of the land office to execute leases and contracts for the mining and shipping of ore from any lands belonging to the State; L. 1901, c. 104, provided that the State reserve for its own use all the iron and other valuable minerals in or upon all lands which might belong to it by virtue of any Act of Congress; L. 1909, c. 49, declared that all iron ores and other minerals on, in, or under the lands within the State which lie beneath the waters of meandered lakes and rivers belong to the State, together with the right to remove such iron ore and other minerals, and that the title thereto shall not be affected by the subsequent drying up of such lakes and rivers; L. 1911, c. 291, §1, declared that the ownership of the beds and lands under the waters of all rivers in this State which are navigable for commercial purposes shall be in the State in fee simple, subject to the regulations made by Congress; L. 1917, c. 110, passed subsequent to State *v.* Korrer, 127 Minn. 60, 148 N. W. 617, 1095, *supra*, authorized the execution of leases such as the one attached to the complaint here, providing for the drainage of lakes and rivers, or the diversion of waters, to permit the re-

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moval of ore; L. 1931, c. 286, gave the executive council authority to extend contracts under the above and authorized the granting of licenses to drain public lakes; and L. 1943, c. 208, recognized and protected existing leases.

The foregoing enactments, which comprise all the laws on this subject enacted by our legislature since statehood (except L. 1897, c. 257, declared unconstitutional in Shell *v.* Matteson, 81 Minn. 38, 83 N. W. 491), establish clearly the State's intention of reserving the title and beneficial ownership of such lake beds in itself. Certainly nothing therein can be construed as a legislative grant thereof to the riparian owners. Likewise, since the rights of these riparian owners to future accretions and relictions are contingent only, it is apparent that they have been cut off before their consummation, by the foregoing legislative enactments. See, Webber *v.* Axtell, 94 Minn. 375, 102 N. W. 915; Griswold, *v.* McGee, 102 Minn. 114, 112 N. W. 1020, 113 N. W. 382; Western Pacific Ry. Co. *v.* Southern Pacific Ry. Co. (9 Cir.), 151 F. 376; Taylor *v.* Underhill, 40 Cal. 471; Eisenbach v. Hatfield, 2 Wash. 236, 26 P. 539, 12 L. R. A. 632.

The foregoing decisions, statutes, and authorities make it clear beyond doubt that the riparian owners here can assert no right, title, or interest in and to the ore under the bed of Syracuse Lake below the low-water mark by virtue of (a) patents issued by the United States to the adjoining lands; (b) any decision of the courts of this State; (c) any legislative enactment or grant; or (d) the doctrine of accretions and relictions.

10. This is an action brought by the State to determine its right of ownership to the ore below low-water mark of the bed of Syracuse Lake and at the same time to establish that the riparian owners have no interest therein. The opinion up to this point definitely establishes that the riparian owners have no interest therein. There remains, then, for consideration only the nature of the State's title to such lake bed and the question whether thereunder it has the right to remove and dispose of the ore under such bed.

It is well settled that at the time of its admission to statehood Minnesota retained and reserved unto itself the

same rights and privileges which were reserved and retained by the original thirteen colonies at the time the Federal Government was established. Shively *v.* Bowlby, 152 U. S. 1, *supra.* Such rights and privileges reserved included the right and title to all navigable waters and the soil under them for the common use, subject only to the rights surrendered to the general government. This principle is stated in Martin *v.* Waddell, 41, U. S. (Pet.) 367, 410, as follows:

> "• • • when the Revolution took place, the people of each state became themselves sovereign; *and in that character hold the absolute right to all their navigable waters and the soils under them* for their own common use, subject only to the rights since surrendered by the Constitution to the general government." (Italics supplied.)

The ownership thus reserved to the states was defined in Mumford *v.* Wardwell, 73 U. S. (Wall.) 423, 436, as follows:

> "(The) Necessary conclusion is, that the ownership of the lot in question, when the State was admitted into the Union, became *vested in the State as the absolute owner,* subject only to the paramount right of navigation."

To the same effect, see, Illinois Central R. Co. *v.* Illinois, 146 U. S. 387; Massachusetts *v.* New York, 271 U. S. 65; Appleby *v.* City of New York, 271 U. S. 364; and New Jersey *v.* Delaware, 291 U. S. 361.

The nature of the title reserved to the states in such navigable water beds was defined in Illinois Central R. Co. *v.* Illinois, *supra,* where the court stated (146 U. S. 452):

> "That the State holds the title to the lands under the navigable waters of Lake Michigan within its limits, • • •. But it is a title different in character from that which the State holds in lands intended for sale. • • • *It is a title held in trust for the people of*

the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. • • • The trust devolving upon the State for the public • • • cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. *It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled.*" (Italics supplied.)

The foregoing decisions clearly establish that under the common law applicable at the time Minnesota was admitted to statehood it held absolute title, both sovereign and proprietary, to all the beds of navigable waters within its boundaries, in trust for the people of the State, primarily that they might enjoy navigation of the waters, carry on commerce on them, and have the liberty of fishing in them free from the interference of private parties. It is made clear by the decisions of the United States Supreme Court subsequent to statehood, particularly in the case of Illinois Central R. Co. *v.* Illinois, 146 U. S. 387, *supra*, that in the exercise of such trust the State may dispose of partial interests in such lands, in the interest of all the people of the State, provided the primary purposes of the trust are not unduly abridged or burdened thereby.

11. Minnesota decisions in general have been in accord with the principles thus stated. Therein, the character of the State's title in such lands is frequently defined as sovereign rather than proprietary. Examination of such decisions makes it clear that the use of the word "sovereign" was intended merely to indicate that the State held such

title in trust for the people, for the purposes of public navigation, commerce, and fishing, and hence that it could not divide or parcel the same for sale as it might other lands. In Union Depot, St. Ry. & Tr. Co. *v.* Brunswick, 31 Minn. 297, 300, 17 N. W. 626, 628, this principle was stated thus:

> "• • • At common law, the king, as representative of the nation, held in trust for them all navigable waters, and the title to the soil under them. This was a sovereign or prerogative, and not a proprietary right. At the revolution the people of each state became sovereign, and in that capacity held all these navigable waters and the soil under them for their common use, • • •."

In Lamprey *v.* State, 52 Minn. 181, 198, 53 N. W. 1139, 1143, this doctrine was expressed as follows:

> "In this state, we have adopted the common law on the subject of waters, with certain modifications, suited to the difference in conditions between this country and England, • • • and • • • we have repudiated the doctrine that the state has any private or proprietary right (as had the king) in navigable waters, but that it holds them in its sovereign capacity, as trustee for the people, for public use."

In the language quoted, the State's ownership was thus distinguished from the ownership of the king under the ancient English doctrine that the latter was in the nature of a private estate in the beds of navigable waters which might be conveyed to any subject. The repudiation of this doctrine did not of necessity negative the absolute title of the State, subject only to its public trust, nor in any manner constitute a restriction on the State's right as trustee to dispose of beneficial interests in such lands, provided that in so doing it (a) acted for the benefit of all the citizens, and (b) did not violate the primary purposes of its trust, namely, to maintain such waters for navigation and other public uses.

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12. In the exercise of its trust, it cannot be seriously doubted that the State has the power, and, in fact, the duty rests upon it, to use such lands for the greatest public good, and where they can be put to productive use, not to permit them to lie waste and unproductive. In so doing, of course, it cannot parcel or alienate them or otherwise interfere with the public purposes of the trust in which they are held. It is clear in the instant case that the State has acted pursuant to statutory authority; that it has not parceled or alienated the lands in question, deprived the public of its rights to navigation or other public uses therein, or otherwise acted in violation of its trust. We have held in a number of decisions that the disposal of iron ore in State lands pursuant to an ordinary mining lease such as is here involved does not constitute a sale or alienation of such State lands. Thus, in State *v.* Evans, 99 Minn. 220, 108 N. W. 958, it was held that R. L. 1905, §§ 2483-2495, whereunder the State reserved for its own use all iron and other minerals in lands owned by it and authorized its land commissioner to issue on its behalf mining leases providing for payment to the State of specified royalties on the ore removed, did not provide for or constitute a sale of such lands in violation of constitutional provisions. Therein we stated (99 Minn. 225, 227, 108 N. W. 960):

> "* * * The term, *no portion of the lands*, as used in the constitution, does not refer to the *separate substance or product of a particular tract of land.* * * *
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> * * * * * * *
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> "The term sale, as ordinarily used, * * * means the transfer of the absolute or general property in the thing sold. In determining whether a mineral lease of the kind here in question is a sale, neither the name nor form given to it by the statute is controlling. The legal effect of the transaction determines its classification, not its form. * * *.
>
> * * * * * * *

> "• • • the rule established by the great weight of authority (is) that *such leases do not constitute a sale of any part of the land,* and, further, that iron or other materials derived from the usual operation of open mines or quarries, constitute the rents and profits of the land, • • •." (Italics supplied.)

See, also, State *v.* Cavour Min. Co., 143 Minn. 271, 173 N. W. 415; Boeing *v.* Owsley, 122 Minn. 190, 142 N. W. 129; and State *v.* Royal Mineral Assn., 132 Minn. 232, 156 N. W. 128, Ann. Cas. 1918A, 145.

13. In many states which, like Minnesota, apply the trust doctrine to state ownership of lands under navigable waters, it has been recognized that under such trusts the State has the right to remove from such lands minerals, oil, and other like products. In Wisconsin, where the trust doctrine prevails and where the courts have specifically held that the State has no proprietary interest in the lands under navigable waters, the Supreme Court, in Angelo *v.* Railroad Comm., 194 Wis. 543, 217 N. W. 570, held that, while the State could not transfer its title, nevertheless, under proper statutory authority, it could by lease confer upon private individuals, authority to remove marl deposits from the lands under such waters. Numerous other states have held that the removal of minerals and like deposits from lands under navigable waters does not constitute a violation of the State's trust or of the rights of riparian owners. See, Taylor *v.* Commonwealth, 102 Va. 759, 47 S. E. 875, 102 A. S. R. 865; Coosaw Min. Co. *v.* South Carolina, 144 U. S. 550; State ex rel. Moose *v.* Southern S. & M. Co., 113 Ark. 149, 167 S. W. 854; Wear *v.* Kansas, 245 U. S. 154; and Watson *v.* Holland, 155 Fla. 342, 20 So. (2d) 388; 1 Farnham, Waters and Water Rights, p. 396.

14. As stated earlier, the principal cases relied upon by the riparian owners are Union Depot, St. Ry. & Tr. Co. *v.* Brunswick, 31 Minn. 297, 17 N. W. 626; Hanford *v.* St. Paul & Duluth R. Co., 43 Minn. 104, 42 N. W. 596, 44 N. W. 1144; Shell *v.* Matteson, 81 Minn. 38, 83 N. W. 491; and the opinion on petition for hearing in State *v.* Korrer, 127 Minn.

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60, 77, 148 N. W. 617. We find nothing in these cases in conflict with the views here expressed.

In the Union Depot case, we held that an act of the legislature authorizing appellant there to use and occupy with its structures that part of Lake St. Croix in front of Stillwater between low-water mark and the center of the lake did not affect the rights of the riparian owners involved. This decision did not enlarge the ordinary rights of riparian owners, but reiterated our prior ruling that such owner has the fee only to the low-water mark, and that, while a riparian owner holds exclusive rights of possession and beneficial interest in "made land" to the point of navigation, beyond that point such owner has no right to intrude.

In the Hanford case, there were involved only the rights of a riparian owner to submerged land between his outer boundary and the point of navigation. There, this court upheld the State's title to lands improved and reclaimed from the water up to the point of navigation when it said (43 Minn. 117, 44 N. W. 1147):

> "• • • We do not wish to be understood as assenting to the proposition that the title of the state may be thus transferred by acts of the riparian proprietor which the state has no particular reason at the time for opposing."

In the Shell case, there was involved the constitutionality of L. 1897, c. 257, which provided for the settlement of disputes between riparian owners of beds of dried up lakes on the basis of joint ownership thereof. Such a division, it was held was *at variance with legal and vested rights of the parties*, and the act accordingly was held unconstitutional. It concerned only lakes which had gradually dried up. It could have no application to a situation such as here involved.

In the Korrer case, on petition for reargument, it appeared (127 Minn. 77, 148 N. W. 1095) that before trial a stipulation had been made between the State and the defendant mining company which recited that the mining company might remove ore already stripped from a certain area below the lake bed involved, but that it should pay the State therefor if the court determined that the State owned such

ore in a proprietary capacity. The majority of the court construed this stipulation as giving the State the right to recover this sum only in the event that the prior opinion had thus determined the State's ownership; and that, since such prior opinion merely held that the State owned the bed of the lake below low-water mark in its sovereign capacity in trust for the people, it necessarily followed that under the stipulation the State had no right to recover for the ore involved. In its memorandum, with reference to the Korrer case, the trial court in the instant case stated:

> "Certainly this final disposition of the Korrer case, resting as it does upon a disputed interpretation of the stipulation in question, does not leave the law in that state of clarity that might be desired. It is argued with much force that if the State does not own the ore in a proprietary capacity and the value of it was awarded to the riparian owner, it must have been intended to imply that the riparian owner owns the ore under the lake. However, I do not agree with that contention. Such construction of the per curiam opinion would run counter to much that was stated to be the law in the first opinion.
>
> • • • • • • •
>
> "It does not seem to me that anything is to be gained by further analysis or discussion of the Korrer case. I do think that the court's opinion is not satisfactory and does not leave clear what the ultimate holding of the Supreme Court will be."

With these statements we agree. If the opinion upon petition for rehearing there had not been limited to the situation then involved, we should be left in the position of holding that no one owns the bed of a navigable lake in such a character that the valuable minerals under it could ever be mined.

15. Appellants rely on United States *v.* Holt State Bank, 270 U. S. 49, as holding that under the Minnesota decisions the bed of a navigable lake belongs to the shore owners.

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In that case, the action was between the United States and riparian owners, and the State was not represented. While the decision of the Supreme Court throws little light on the reasons which compelled the conclusion there arrived at, it is clear from the Circuit Court's decision therein that the later court regarded the case as governed by the doctrine of accretions and relictions, not here involved. Any statutory justification for a transfer of title to the riparian owners in that case must be found in L. 1905, c. 230, under which the lake there was drained. While there is no direct statement in such statute to this effect, it may be inferentially drawn from the statement therein (§6) that the viewers were required to show, among other things, "the number of acres added to any tract by the total or partial drainage of any meandered lake, or by the change of any water course, and the location and value of such added land, * * *." The decision in the Holt case does not appear to be in point here and is, of course, not binding on this court.

16. On June 23, 1947, the United States Supreme Court, in the case of United States *v.* California, . . . U. S. . . ., held that the United States is entitled to the resources of the soil under the ocean within the three-mile marginal belt. In that case, however, the court did not overrule its previous holdings in Pollard, Lessee, *v.* Hagan, 44 U. S. (How.) 212; Martin *v.* Waddell, 41 U. S. 367 (Pet.), *supra*, and other cases, but recognized the holdings therein as still applicable to *inland* navigable waters. There the court said (. . . U. S. . . .):

> "As previously stated this court has followed and reasserted the basic doctrine of the Pollard case many times."

17. The foregoing authorities indicate that the State, under proper statutory authority, may provide for the removal of ore beneath the beds of its navigable waters. The statutory authority in the instant case is conferred by L. 1917, c. 110, and subsequent statutes cited *supra*, under which these operations have taken place. Here,

there is no attempt to deprive riparian owners or the public of their rights to navigation or other public uses in the waters involved, or to take from such shore owners their property without due process of law. We have consistently held that the latter have no property beyond the low-water mark, other than their rights incidental to navigation, wharfage and other like uses. There has been no grant from the legislature conferring upon them any rights in this lake bed. The legislature has repeatedly declared title to such lands to be in the State, with the right in the latter to remove ore therefrom. Such removal is consistent with the State's sovereign title, as defined by the common law in existence at the time Minnesota was admitted to statehood, and in subsequent interpretations thereof both by the United States Supreme Court and by this court. It is not in conflict with the trust theory under which it holds title to such lands, nor its duty as trustee to exercise such trust for the greatest good of all the people.

Affirmed.

Mr. Justice Peterson took no part in the consideration or decision of this case.

STATE OF MINNESOTA,
Office of Clerk of Supreme Court,
St. Paul, Minn.

APPENDIX F

Order and Opinion of the Supreme Court of Minnesota Denying Petition for Reargument and Making Certain Changes in the Original Opinion, Dated December 5, 1947.

ORDER

Sir:

You will please take notice that on this date the following order was entered in the above entitled cause:

Ordered, that the petition for reargument herein be and the same hereby is denied and stay vacated, but the opinion

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as heretofore made is modified by substituting for the words "It is not disputed" (line 3, second paragraph, page 6 of opinion) the words "It is well established"; by substituting for the words "It is conceded" (at point 5, page 12 of opinion) the words "It is well settled"; and by striking from point 6, page 12, the words "and is likewise conceded"; and that the opinion as originally filed, modified as above outlined, shall be the final opinion of this court herein.

By the Court, Thomas Gallagher, J.

Yours respectfully,

GRACE KAERCHER DAVIS,
Clerk Supreme Court.

APPENDIX G

Second Opinion of the Supreme Court Rendered in Connection With Appellants' Second Appeal, Dated December 24, 1948.

SYLLABUS

When an order denying a new trial has been affirmed on appeal, all questions that might have been raised therein are set at rest and cannot be raised on a subseqvent appeal from the judgment.

Judgment affirmed.

OPINION

Per CURIAM:

The assignments of error raise the identical questions presented on the former appeal from an order denying defendants' motion for a new trial. State *v.* Longyear Holding Co. 224 Minn. 451, 29 N. W. (2d) 657. Where an order denying a new trial has been affirmed on appeal, all questions that might have been raised therein are set at rest and cannot be raised on a subsequent appeal from the

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judgment. School Dist. No. 1 *v.* Aiton, 175 Minn. 346, 348, 221 N. W. 424, 425; Skog *v.* Pomush, 221 Minn. 11, 20 N. W. (2d) 530; 1 Dunnell, Dig & Supp. §398.

Hence, the decision on the former appeal is decisive here. Judgment affirmed.

(1474)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

Office Supreme Court, U.S.
FILED
MAR 17 1949
CHARLES ELMORE CROPLEY
CLERK

No. 649

LONGYEAR HOLDING COMPANY, A CORPORATION, HELEN H. BENNETT, C. M. HILL LUMBER COMPANY, A CORPORATION, THE ADAMS CORPORATION, A CORPORATION, HAROLD W. McCORMACK, JOHN ANDREW PETERSON, FANNIE E. DANIELS, ANNIE E. DANIELS, MINNIE DANIELS MANN, JENNIE D. CAMP, ANN R. HESS, WILLIAM R. DANIELS, LANCAS IRON COMPANY, A CORPORATION, THE NORTH STAR IRON COMPANY OF WEST VIRGINIA, A CORPORATION, SAGINAW LAND COMPANY, A CORPORATION, HELEN EMERSON JAMISON, FRANCES SELLWOOD LUSTER, R. M. SELLWOOD, JR., AND JOSEPH GERALD SELLWOOD,

Appellants,

vs.

STATE OF MINNESOTA

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

J. A. A. BURNQUIST,
Attorney General;
GEORGE B. SJOSELIUS,
Deputy Attorney General;
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State of Minnesota,
Counsel for Appellee,
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Saint Paul, Minnesota.



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INDEX

	Page
Motion to dismiss	1
Statement in support of motion to dismiss and in opposition to the jurisdiction of this Court	2
Statement of the case	2
Statutory provisions claimed to sustain jurisdiction	4
Statutes of the State claimed to be involved	4
Date of judgment and application for appeal	4
Cases claimed by appellants to sustain the jurisdiction	4
Raising the Federal questions and rulings thereon by the courts below	5
Statement of grounds upon which it is contended that the questions involved are substantial	13
Conclusion	20

Cases Cited

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673	14
Brisbine v. *Ry. Co.*, 23 Minn. 114	16
Carpenter v. *Board of Commissioners*, 56 Minn. 513, 520	19
Gilbert v. *Eldridge*, 47 Minn. 210	17
Hanford v. *St. Paul & Duluth R. Co.*, 43 Minn. 104, 112, 117	15, 18
Honeyman v. *Homan*, 300 U. S. 14	12
Lamprey v. *State*, 52 Minn. 181	15
Lynch v. *New York*, 293 U. S. 52, 54	12
Miller v. *Mendenhall*, 43 Minn. 95	17
Morrill v. *St. Anthony Falls Water Power Co.*, 26 Minn. 222	16
Nelson v. *DeLong*, 213 Minn. 425, 431	17
Petraborg v. *Zontelli*, 217 Minn. 536, 547, 548	18
Pollard v. *Hagen*, 44 U. S. (How.) 212	7
Rooker v. *Fidelity Trust Co.*, 261 U. S. 114	12
St. Paul S. & T. F. R. Co. v. *First Division, etc. R. Co.*, 26 Minn. 31	16

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Page

Schurmeier v. *St. Paul and Pacific Railroad Co.*, 19 Minn. 82 (Gil. 59) 16
Scott v. *Lattig*, 227 U. S. 1 7
Shell v. *Matteson*, 81 Minn. 38 ..... 8, 15
Shively v. *Bowlby*, 152 U. S. 1 7
Southwestern Bell Telephone Co. v. *State of Oklahoma*, 303 U. S. 206, 212 12
State v. *Cavour Mining Co.*, 143 Minn. 271 19
State v. *Evans*, 99 Minn. 220 19
State v. *Korrer*, 127 Minn. 60, 72 15
State v. *St. Paul & Duluth R. Co.*, 81 Minn. 422, 425 18
Tidal Oil Co. v. *Flannagan*, 263 U. S. 444 11
Union Depot St. Ry. Tr. Co. v. *Bruswick*, 31 Minn. 297 15
United States v. *Holt State Bank*, 270 U. S. 49 15
7 Wall. 272, 288, 289 16

STATUTES AND CONSTITUTIONAL PROVISIONS CITED

United States Constitution, Art. 1, Sec. 10 ..... i0, 11, 12
Minnesota Laws of 1909, Chapter 49 ..... 6, 7, 10
Minnesota Laws of 1917, Chapter 110 ..... 8, 9
United States Code, Title 28, Section 1257 (2) 4, 12
Judicial Code, Sec. 237, as amended 11

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 649

STATE OF MINNESOTA,

Appellee,

vs.

LONGYEAR HOLDING COMPANY, A CORPORATION, ET AL.,

Defendants,

LONGYEAR HOLDING COMPANY, A CORPORATION, HELEN H. BENNETT, C. M. HILL LUMBER COMPANY, A CORPORATION, THE ADAMS CORPORATION, A CORPORATION, HAROLD W. McCORMACK, JOHN ANDREW PETERSON, FANNIE E. DANIELS, ANNIE E. DANIELS, MINNIE DANIELS MANN, JENNIE D. CAMP, ANN R. HESS, WILLIAM R. DANIELS, LANCAS IRON COMPANY, A CORPORATION, THE NORTH STAR IRON COMPANY OF WEST VIRGINIA, A CORPORATION, SAGINAW LAND COMPANY, A CORPORATION, HELEN EMERSON JAMISON, FRANCES SELLWOOD LUSTER, R. M. SELLWOOD, JR., AND JOSEPH GERALD SELLWOOD,

Appellants

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

Motion to Dismiss

The appellee moves the Court to dismiss the appeal herein on the ground that it has no jurisdiction for the reasons following:

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1. That there is not drawn in question by this appeal the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision of the Supreme Court of Minnesota is not in favor of the validity of any such law.

2. The Court is without jurisdiction because no substantial Federal question is raised by the appeal.

3. That the decision of the Supreme Court of Minnesota is sustainable upon nonfederal grounds sufficient to support it.

This motion is filed by the appellee pursuant to paragraph 3 of Rule 12 of this Court in response to the statement as to jurisdiction and other papers filed by the appellants, which urged this Court to review on appeal the judgment entered by the court below.

Statement in Support of Motion to Dismiss and in Opposition to the Jurisdiction of This Court

The appellants attempt to appeal from a final judgment of the Supreme Court of the State of Minnesota affirming a judgment of the district court of St. Louis county, Minnesota.

This Court has jurisdiction only if the decision and judgment of the Minnesota court were based upon statutes of the State of Minnesota, if such statutes were repugnant to the Constitution of the United States and if the decision was in favor of their validity.

Statement of the Case

Appellants open their statement of the case with the statement:

> "This case involves the ownership of the *alienable, proprietary,* beneficial rights and uses in some 33 acres of land in St. Louis County, Minnesota, which had

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formerly been the bed of a small shallow body of water known as 'Syracuse Lake' " (Statement as to jurisdiction p. 2).[1]

This statement is not correct. What was found by the trial court and determined by the Supreme Court of Minnesota was, in substance, as stated by the Minnesota court in its opinion (Statement as to jurisdiction, appendix, p. 67; 224 Minn. 456; second record in court below, pp. 7-8):

> "That Syracuse Lake at the time of Minnesota's admission to the Union was part of a navigable highway extending from the mouth of the St. Louis river to Lake of the Woods; hence that the state retained or reserved title to the bed thereof below low-water mark and now holds the same in its sovereign governmental capacity in trust for the people of the state, although not in absolute proprietorship with right of alienation; that the state is the owner of iron ores and other minerals on, in, or below certain water mark of the lake, with the right to dispose of the same by lease subject only to the prior lease and agreement held by Lake Mining Company hereinbefore described and that none of the riparian owners are entitled to receive or to be paid any royalties or other compensation for the ore removed from said portion of the lake bed."[2]

The decision presented for review is not to be measured by the claims of the appellee, nor by assertions of appellants in their answers or briefs, but by the decision of the Supreme Court of Minnesota. For this reason, rather than tax the patience of the Court with a further extended sentence by sentence correction of appellants' so-called "statement of facts", appellee will stand upon the statement of facts as set out in the opinion of the Minnesota

---

[1] All emphasis in this statement supplied unless otherwise noted.

[2] It is not disputed that the lease to the Lake Mining Company referred to was a lease from the State. (Statement as to jurisdiction, p. 4.)

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Supreme Court. (Statement as to jurisdiction, appendix pp. 66-70; 71-75; 224 Minn. 455-458; 460-462; second record in court below p. 6-11; 15-20).

Statutory Provisions Claimed to Sustain Jurisdiction

(Statement as to jurisdiction p. 8)

Appellants have by their statement rested their right to appeal upon Title 28, U. S. Code, Section 1257 (2), as enacted effective September 1, 1948, by public law 773—80th Congress. The first ground of respondent's motion for dismissal is that appellants have not brought themselves within that statute.

Statutes of the State Claimed to Be Involved

(Statement as to jurisdiction pp. 8-10)

It is the position of appellee that the decision of the Minnesota Supreme Court is not based upon the statutes cited by appellants in their statement as to jurisdiction, but upon the common law as announced and elucidated by the Supreme Court of the United States and as interpreted by the Supreme Court of Minnesota. This position will be further argued *infra*.

Date of Judgment and Application for Appeal

(Statement as to jurisdiction pp. 10-11)

Appellee does not dispute the statements of appellants under this heading.

Cases Claimed by Appellants to Sustain the Jurisdiction

(Statement as to jurisdiction p. 11)

Appellee contends, and will point out *infra*, that the cases cited by appellants do not sustain the jurisdiction of the Court.

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Raising the Federal Questions and Rulings Thereon by the Courts Below

(Statement as to jurisdiction pp. 12-19)

As to the matters set forth under this heading, the position of respondent is:

1. Appellants by their pleadings and assignment of error probably sufficiently raised the Federal questions claimed by them to exist in the court below.

2. Even under the isolated quotations from appellee's brief in the court below, it is apparent that appellee did not rely upon the statutes in question except as a legislative declaration of what was already established law of the State. There is nothing in the original complaint to indicate that its claim is based upon those statutes. The complaint is phrased in the ordinary language of a complaint in an action to determine adverse claims. It alleges (original record in lower court p. 2):

> "That plaintiff is the owner in fee simple of the following described lands situate in the county of St. Louis, State of Minnesota, to-wit:
>
> "That portion of the bed of said Syracuse Lake, below low-water mark as shown and delineated on the blueprint hereto attached marked Exhibit 'A' and made a part hereof as fully as though herein incorporated; is the sole owner of all iron ores and other minerals on, in, or under said lands together with the right to enter upon said lands and explore for and mine and remove such iron ore and other minerals, and has and *ever since the organization of the State of Minnesota* has had the right to sell, lease, or otherwise use or dispose of such lands and such iron ores or other minerals, and has the right to provide for the drainage of said Syracuse Lake, or the diversion of its waters to a new bed or channel in order to per-

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mit the prospecting for and mining, removal, and disposition of said iron ore and other minerals, which drainage shall not affect the aforesaid title or rights of the plaintiff; subject only to such rights as have been granted in and as defined in paragraph IV hereof (Lake Mining Company lease)."

The prayer is to like effect. Under it appellee was entitled to claim whatever rights it enjoyed under the common law and to reenforce that claim by reference to statutes, as it saw fit. The question now for determination is what was the ultimate decision of the Minnesota Supreme Court and upon what ground was that decision based.

3. The original memorandum of the district court (Statement as to jurisdiction appendix pp. 51-60) and its supplemental memorandum (Statement as to jurisdiction appendix pp. 60-63), if material, make it clear that the decision of that court was based upon the common law and prior decisions of the Supreme Court of Minnesota and that Minnesota laws 1909, c. 49, was simply referred to as a legislative declaration of what was at the time of its enactment the settled law of the State.

4. The reference on p. 17 of the statement as to jurisdiction to that portion of the opinion of the Minnesota Supreme Court (Statement as to jurisdiction appendix 81; 224 Minn. 469; second record in court below p. 29) using the language "have been cut off before their consummation by the foregoing legislative enactments", is misleading because the context shows clearly that the court was dealing only with the matter of accretions and relictions, which are wholly a matter of State control. The complete language of the sentence from which the partial quotation has been taken is:

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"Likewise, since the rights of these riparian owners to future accretions and relictions are contingent only, it is apparent that they have been cut off before their consummation by the foregoing legislative enactments."

5. The opinion of the Supreme Court of Minnesota clearly demonstrates that its decision was not based upon Minnesota Laws 1909, c. 49, but upon its construction of the common law, and that any references to the statute in question were merely by way of demonstrating that the legislature of Minnesota had never made any enactment or grant vesting riparian owners with any interest in the beds of navigable lakes, but had constantly and consistently affirmed the right of the State to ore lands under the beds of navigable lakes or streams. This is shown by the following excerpts from the opinion of the court after citing *Pollard* v. *Hagan*, 44 U. S. (How.) 212, *Shively* v. *Bowlby*, 152 U. S. 1, and *Scott* v. *Lattig*, 227 U. S. 229 in support of the statement:

"It is well settled that upon admission of a state to the Union title to the beds of all navigable waters therein remains in the state, the federal government taking no title or interest therein except under its power to regulate commerce between the states."

"It follows that the riparian owners here acquired no title to the bed of Syracuse Lake below low-water mark by virtue of the patents issued to them or their predecessors by the United States covering lands adjoining this navigable lake. Under the decisions of this court, it seems equally clear that they did not acquire any right or *beneficial* interest in and to the bed of this lake, other than (1) the ordinary riparian rights of navigation, dockage, wharfage and similar privileges or (2) those contingent rights or privileges resulting from the doctrine of *accretions and relictions*". (Italics in this quotation by the court)

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Then, following a discussion of prior Minnesota decisions, the court said:

> "Under the foregoing Minnesota decisions, it is clear that the riparian owners here can claim no title whatsoever to the bed under Syracuse Lake unless the State by legislative grant has relinquished its title to the riparian owners or unless they have gained a portion thereof as the result of accretions and relictions. There is no contention here by the riparian owners that the state either by legislative grant or by act of grace has ever relinquished to them its title to the bed of Syracuse Lake."

The court then discussed the doctrine of accretions and relictions and held that in the instant case the riparian owners could not rest their claims on that doctrine.

The opinion then proceeds:

> "It is equally clear that there has been no legislative enactment or grant vesting these shore owners with any interest in the portion of the lake bed involved. On the contrary, the acts of the legislature with reference thereto have been exactly to the opposite effect. It has consistently and constantly affirmed the right of the State to ore lands under the beds of navigable lakes and streams."

Then after citing the various statutes of Minnesota with reference to iron ore and the ownership of lake beds, including Minnesota Laws 1909, c. 49, and Minnesota Laws 1917, c. 110, the court said:

> "The foregoing enactments, which comprise all the laws on this subject enacted by our legislature since statehood (except Laws 1897, c. 257, declared unconstitutional in *Shell* v. *Matteson*, 81 Minn. 38, 83 N. W. 491), established clearly the state's intention of reserving the title and beneficial ownership of such lake beds in itself. Certainly nothing therein can be con-

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strued as a legislative grant thereof to the riparian owners."

(Statement as to jurisdiction appendix p. 81; 224 Minn. 463-469; second record in court below pp. 20-29)

Up to this point, the court had reached the conclusion that it was clear that the riparian owners (appellants here) could assert no right, title or interest in or to the ore under the bed of Syracuse Lake below the low water mark by virtue of

(a) patents issued by the United States to the adjoining lands;

(b) any decision of the courts of this state;

(c) any legislative enactment or grant; or

(d) the doctrine of accretions and relictions.

(Statement as to jurisdiction appendix p. 81; 224 Minn. 463-469; second record in court below pp. 20-29)

The following language of the opinion which deals with the nature of the state's title to the lake bed and the question whether thereunder it has the right to remove and dispose of the ore under that bed makes it patent that the decision of the court on that question, which affirmed the rights of the state, is based entirely upon the decisions of the Supreme Court of the United States and upon its own. The only reference to the statutes referred to by appellants is to Laws 1917, c. 110, and subsequent statutes, and that is found in the final paragraph of the opinion which reads:

"The foregoing authorities indicate that the state, under proper statutory authority, may provide for the removal of ore beneath the beds of its navigable waters. The statutory authority in the instant case is conferred by L. 1917, c. 110, and subsequent statutes cited *supra*, under which these operations have taken place. Here,

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there is no attempt to deprive riparian owners or the public of their rights to navigation or other public uses in the waters involved or to take from such shore owners their property without due process of law. We have consistently held that the latter have no property beyond the low-water mark other than their rights incidental to navigation, wharfage, and other like uses. There has been no grant from the legislature conferring upon them any rights in this lake bed. The legislature has repeatedly declared title to such lands to be in the state, with the right in the latter to remove ore therefrom. Such removal is consistent with the state's sovereign title, as defined by the common law in existence at the time Minnesota was admitted to statehood, and in subsequent interpretations thereof both by the United States Supreme Court and by this court. It is not in conflict with the trust theory under which it holds title to such lands, nor its duty as trustee to exercise such trust for the greatest good of all the people."

(Statement as to jurisdiction appendix p. 89; 224 Minn. 478; second record in lawer court pp. 42-43)

There is no reference in the portions of the opinion dealing with the rights of the state to Laws 1909, c. 49; and Laws 1917, c. 110, and subsequent statutes are merely procedural statutes providing methods for entering into contracts for the mining and disposing of iron ore situate under any waters or navigable lakes and rivers in the state of Minnesota. These statutes do not purport to establish the title of the state in or to such lake or river beds.

6. Insofar as there is attempted to be claimed any violation of contract rights under Article I, section 10 of the Constitution of the United States, that claim is without merit, because that section of the federal constitution is directed only against an impairment by legislative action and

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not against any judicial decision or change in judicial decision.

In *Tidal Oil Co.* v. *Flannagan*, 263 U. S. 444, which came up on error to the Supreme Court of Oklahoma, the claim was made that the judgment of the Oklahoma court deprived defendants of their property without due process of law, contrary to the Fourteenth Amendment, and that the Supreme Court of the state, in holding a judgment and certain confirmations to be void, reversed its previous decisions and changed a rule of property of the state upon the faith of which a deed, leases, and other contracts set up by the defendant were made, and thus impaired their obligations in violation of Section 10, Article I, of the federal Constitution.

One of the grounds of the motion to dismiss having been that the federal questions were raised too late, the Court held that the objection based on the Fourteenth Amendment did not come too late because it appeared in the assignment of errors filed on the appeal from the district court to the state supreme court. However, this Court said:

> "The assignment, however, has no substance in it. The parties to this action have been fully heard in the state court in the regular course of judicial proceedings; and in such a case the mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law." (citing numerous cases)

Discussing the 1922 amendment to Section 237 of the judicial code (act Feb. 17, 1922), c. 54, 42 Stat. 366, which was repealed by Section 13 of act February 13, 1925, c. 229, the Court said further:

> "We cannot assume that congress attempted to give to this court appellate jurisdiction beyond the judicial power accorded to the United States by the Constitu-

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> tion. The mere reversal by a state court of its previous decision, as in the case before us, whatever its effect on contracts, does not, as we have seen, violate any clause of the federal Constitution. Plaintiff's claim, therefore, does not raise a substantial federal question. This has been decided in so many cases that it becomes our duty to dismiss the writ of error for want of jurisdiction."

With reference to the claim that the decision of the state court violated the provisions of Section 10, Article I, of the federal Constitution, the Court said:

> "It has been settled by a long line of decisions that the provisions of Section 10, Article 1, of the federal Constitution, protecting the obligation of contracts against state action, is directed only against impairment by legislation and not by judgments of courts."

See also *Rooker* v. *Fidelity Trust Co.*, 261 U. S. 114.

7. Since it does not appear affirmatively from the record that a decision by the Supreme Court of Minnesota of the federal question attempted to be raised was necessary to the determination of this case; that such federal question was actually decided, or that the judgment as rendered could not have been given without deciding it, appellants have no right of appeal under Title 28, U. S. Code Section 1257 (2), as enacted effective September 1, 1948, by public law 773—80th Congress.

Southwestern Bell Telephone Co. v. *State of Oklahoma*, 303 U. S. 206, 212;
Honeyman v. *Homan*, 300 U. S. 14;
Lynch v. *New York*, 293 U. S. 52, 54.

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Statement of Grounds Upon Which It Is Contended That the Questions Involved Are Substantial

The whole argument of appellants under this heading is epitomized in the statement appearing at p. 37 of the statement as to jurisdiction as follows:

> "By giving effect to Minnesota Laws of 1909, Chapter 49, and Laws of 1917, Chapter 110, the decision of the District Court, affirmed by the Minnesota Supreme Court, if permitted to stand, impairs the obligations of appellants' contracts and deprives appellants of their property without due process of law. The decision, as it stands, opens the way for the appropriation by the State of many hundreds of millions of dollars of what heretofore has uniformly been held to be private property. There is left no apparent limit to the power of the legislature to seize and use for private exploitation and without compensation to the owners, private rights of every sort heretofore vested under established Minnesota law."

Their entire claim is bottomed upon the proposition last discussed. They reiterate that the decision of the Minnesota Supreme Court was based upon the 1909 act, and that prior to the enactment of that legislation it had been conceded by the Minnesota court that title to the beds of navigable lakes was vested in the riparian owners. The fallacy of the first claim has already been pointed out. The second claim is similarly without foundation. They repeat the argument that the instant decision is contrary to the prior decisions of the Minnesota court, and that under prior decisions their rights were established to such an extent that the present decision amounts to deprivation of property rights, in violation of the due process clause of the federal Constitution. Even if it be conceded that the present decision overrules prior decisions—which, of course, is not conceded and is violently disputed by the

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opinion of the Minnesota court—appellants can find no consolation in the decisions of this Court. As stated in *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673:

> "It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this Court's power to review decisions of the supreme courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court."

However, appellee respectfully submits that not a single Minnesota case can be found holding that a riparian owner has any alienable or proprietary rights in the bed of a navigable lake below low-water mark, or any beneficial rights or uses beyond the ordinary riparian rights of navigation, dockage, wharfage and similar privileges, and the contingent rights or privileges resulting from the doctrine of accretions and relictions, and that under all prior decisions even the ordinary riparian rights cease at the point of navigability[3].

It is not clear whether appellants question the decision of the Minnesota court as to the navigability of Syracuse Lake. That court adopted the federal test of navigability (Statement as to jurisdiction appendix pp. 70-73; 224 Minn. 458-460; second record in court below pp. 12-15).

Under the rules stated in the cases from this Court cited by the Minnesota court, as stated by the latter court, "it cannot be seriously disputed that the evidence admitted at

---

[3] No claim of any distinction between low-water mark and the point of navigability is made in this case.

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the trial herein is sufficient to sustain the trial court's finding that Syracuse Lake at the time of Minnesota's admission to statehood was part of a navigable waterway." (See Statement as to jurisdiction appendix p. 72; 224 Minn. 460-463; second record in court below pp. 15-20.)

Appellants admit that if the waters were navigable under the federal tests, the effect of the patents and conveyances and the respective and relative rights and interests of the state and of the lot owners in the waters and their beds are to be determined in accordance with the law of the state where the same are located as declared or construed by its courts. (Statement as to jurisdiction p. 21.)

This admission once made, it would not seem necessary to pursue the rabbit of appellants' argument much further. The distinction between "public waters" and "navigable waters" seems of little importance. As a matter of fact, by limiting the rights of riparian owners in "public waters" as it has in prior decisions, the Minnesota court has in those decisions restricted the rights of those owners more closely than in the instant case.

At the risk of unduly lengthening these objections, appellee finds it necessary, because of the partial quotations by appellants at pp. 23-27 of the statement as to jurisdiction, to make further quotations from those and other opinions, in order to present the actual prior holdings of the Minnesota court.

The cases of *Union Dept. St. Ry. Tr. Co.* v. *Brunswick*, 31 Minn. 297; *Lamprey* v. *State*, 52 Minn. 181; *Hanford* v. *St. Paul & Duluth R. Co.*, 43 Minn. 104, 112, 117; *Shell* v. *Matteson*, 81 Minn. 38, and *State* v. *Korrer*, 127 Minn. 60, 72, as well as *U. S.* v. *Holt State Bank*, 270 U. S. 49, are quite adequately analyzed in the opinion of the Minnesota Supreme Court. (Statement as to jurisdiction pp. 75-78, 81-84, 86-88; 224 Minn. 464-466, 472-473, 475-477; second record in court below pp. 20-25, 33-35, 37-40.)

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As to the other cases cited by appellants, we submit these brief comments.

In *Schurmeier* v. *St. Paul and Pacific Railroad Co.*, 10 Minn. 82 (Gil. 59) the court, solely by way of dictum, stated that the title to the beds of fresh water lakes and streams was in the riparian owners. Upon appeal to this Court, the final decision of the Minnesota court was affirmed because the title to the bed was not involved, but this Court in 7 Wall. 272, saw fit to expressly correct the error in the dictum of the Minnesota court by saying:

> "• • • but the better opinion is, that proprietors of land bordering on navigable rivers, under titles derived from the United States hold only to the stream, as the express provision is, that all such rivers shall be deemed to be, and remain public highways."
>
> 7 Wall. 272, 288, 289.

The decision of this Court was recognized and deferred to in *St. Paul S. & T. F. R. Co.* v. *First Division, etc., R. Co.*, 26 Minn. 31, and *Morrill* v. *St. Anthony Falls Water Power Co.*, 26 Minn. 222.

Brisbine v. *Ry. Co.*, 23 Minn. 114, simply defined the rights of riparian owners as follows:

> "According to the doctrine of these decisions the plaintiff possessed the right to enjoy free communication between his abutting premises and the navigable channel of the river, to build and maintain, for his own and the public use, suitable landing places, wharves and piers, on and in front of his land and to extend the same therefrom into the river, to the point of navigability, even though beyond low water mark, *and to this extent exclusively to occupy*, for such and like purposes, the bed of the stream, subordinate and subject only to the navigable rights of the public, and such needful rules and regulations for their protection as may be prescribed by competent legislative authority."

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Miller v. *Mendenhall*, 43 Minn. 95 dealt only with the shallows in Lake Superior between low-water mark and the point of navigability, and a careful reading of the decision shows that the holding was based not only upon riparian rights but on the fact that the legislature had authorized the establishment of a harbor line at the point of navigability and, by so doing, the state had actually made a grant to the riparian owner. In view of the present claim of appellants that the state has no right to make a transfer of property under navigable water, this language is extremely interesting:

> "The state is authorized to regulate the exercise of riparian rights in the interests of the public, and may also make concessions to private owners of possessory rights in the soil of navigable waters, the effect of which will be to give them private and exclusive rights equivalent to a grant. (Citing *Gould on Waters*, §§ 138-140.)"

The court further held that the action of the legislature in establishing a harbor line was a regulation of the exercise of riparian rights, a settlement of the line of navigability, above which the state would not interfere, and an implied concession of the right to build, possess, and occupy to the established line, which amounts practically to a qualified possessory title.

Gilbert v. *Eldridge*, 47 Minn. 210, merely followed the preceding cases of *Miller* v. *Mendenhall* and *Hanford* v. *St. Paul & Duluth R. Co.* and held as an ultimate conclusion that a riparian owner had the right to disassociate his riparian rights from the shoreland.

In *Nelson* v. *DeLong*, 213 Minn. 425, 431, the court said:

> "As against the state, a riparian owner can exercise no dominion or make a valid grant of rights in waters adjacent to riparian lands or in the submerged lands under such waters."

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Insofar as the rights of riparian owners were concerned, it went no further than does the instant case.

In the latest case of *Petraborg* v. *Zontelli*, 217 Minn. 536, 547, 548, the court again defined the rights of a riparian owner as these:

> "* * * he may deny access to and from the water at his particular property; he may build piers and wharves from his land out to navigable waters; he has an exclusive right of access to the lake by reason of his ownership of the abutting land; and he may claim accretions and relictions caused by changes in the current or flow of the water. (Citing *Brisbine*, *Brunswick*, and *Korrer*.) These rights, of course, are subordinate to the paramount rights of the public. (Citing *Nelson* v. *DeLong*.)"

In *Union Depot, etc., Co.* v. *Brunswick, supra*, Mr. Justice Mitchell made it very clear that when he spoke of the riparian owner having an exclusive right of possession and an entirely beneficial interest, he was speaking of "made land" in lieu of a pier *to the point of navigability*. Beyond the point of navigability he made it equally clear that a riparian owner has no right to intrude, and that if he does intrude he can claim no additional rights on account of the intrusion, and that if it were proposed to take his property for public use by the exercise of eminent domain, he could claim no additional compensation by reason of any construction beyond the point of navigability. (See 31 Minn. 302.)

With reference to *Hanford* v. *St. Paul & Duluth R. Co.*, 43 Minn. 104, of which much is made by appellants, the Minnesota court in *State* v. *St. Paul & Duluth R. Co.*, 81 Minn. 422, 425, said:

> "Riparian rights are by nature mere incidents to the shore property of which they are a part * * *. This court went quite as far as sound reason and logic would seem to warrant when it held that the owner could, at

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his option separate his riparian rights, and sell and dispose of them independently of the parent estate • • •."

In *Carpenter* v. *Board of Commissioners,* 56 Minn. 513, 520, the court said:

> "While the title of a riparian owner on navigable or public waters extends to only low-water mark yet it is unquestionably true that his title is not absolute, except to ordinary high-water mark."

Above all things, it should be kept in mind that in no decision of the Minnesota court, except as in the one isolated orphan paragraph in the *per curiam* opinion on rehearing by a divided court in *State* v. *Korrer, supra,* which was sufficiently disposed of by the court in the instant case, has there been directly involved the question of rights of the state in the beds of its navigable waters, and in no other case has the state been a party.

As to the rather labored claim of appellants on p. 29 of the statement as to jurisdiction that a lease of mining rights is an alienation thereof, appellee respectfully submits that this was a matter for state determination and the holding that the disposal of iron ore in state lands pursuant to an ordinary mining lease such as is here involved does not constitute a sale or alienation of such state lands, as had previously been held in *State* v. *Evans,* 99 Minn. 220, *State* v. *Cavour Mining Co.,* 143 Minn. 271, and other cases, presents no federal question.

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Conclusion

It is respectfully submitted that the appeal should be dismissed for lack of jurisdiction.

It is further respectfully submitted that since no reasonable ground for granting a petition for writ of certiorari appears, no such writ should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

Office Supreme Court, U.S.
FILED
APR 7 1949
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1948.

No. 649

LONGYEAR HOLDING COMPANY, a Corporation, HELEN H. BENNETT, C. M. HILL LUMBER COMPANY, a Corporation, THE ADAMS CORPORATION, a Corporation, HAROLD W. McCORMACK, JOHN ANDREW PETERSON, FANNIE E. DANIELS, ANNIE E. DANIELS, MINNIE DANIELS MANN, JENNIE D. CAMP, ANN R. HESS, WILLIAM R. DANIELS, LANCAS IRON COMPANY, a Corporation, THE NORTH STAR IRON COMPANY OF WEST VIRGINIA, a Corporation, SAGINAW LAND COMPANY, a Corporation, HELEN EMERSON JAMISON, FRANCES SELLWOOD LUSTER, R. M. SELLWOOD, JR., and JOSEPH GERALD SELLWOOD,

Appellants,

vs.

STATE OF MINNESOTA,

Appellee.

APPEAL FROM
THE SUPREME COURT OF THE STATE OF MINNESOTA.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMIES THE APPEAL AND STATEMENT OPPOSING JURISDICTION OF THIS COURT.

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INDEX.

Appellee's "Statement in Support of Motion to Dismiss and in Opposition to the Jurisdiction of This Court" 3

Statement of Case 5

Statutes of the State Claimed to Be Involved..... 6

Raising the Federal Questions and Rulings Thereon By the Courts Below 7

Statement of Grounds Upon Which It Is Contended That the Questions Involved Are Substantial 14

TABLE OF AUTHORITIES.

Cases.

Appleby v. City of New York, 271 U. S. 364..... 6

Blackman v. Wheaton, 13 Minn. 33 (1868)..... 17

Bradshaw v. Duluth Imperial Mill Co., 52 Minn. 64... 19

Carpenter v. Board of Commissioners, 56 Minn. 515... 20

Hobart v. Hall, 174 Federal 433 (affirmed 186 Fed. 426) 17, 22

Lamprey v. State, 52 Minn. 181 .....15, 22

Miller v. Mendenhall, 43 Minn. 95 .....16, 19

Morrill v. St. Anthony Falls Water Power Co., 26 Minn. 222 .....15, 18

Nelson v. Delong, 213 Minn. 425 19

Oklahoma v. Texas, 258 U. S. 574..... 23

Petraborg v. Zontelli, 217 Minn. 536..... 20

Railroad Co. v. Schurmeier, 7 Wall. 272 .....17, 18

St. Anthony Falls Water Power Co. v. Board, 168 U. S. 349 10

St. Paul S. & T. F. R. Co. v. First Division, etc. R. Co., 26 Minn. 31 .....18, 19

Schurmeier v. St. Paul & Pacific R. R. Co., 10 Minn. 59 (1865) 17

Shively v. Bowlby, 152 U. S. 1 4

State v. Korrer, 127 Minn. 60.....21, 23

State v. Pulle, 12 Minn. 164 (1866) 17

State v. St. Paul and Duluth R. Co., 81 Minn. 422 (1900) 21, 22

Terre Haute & Indianapolis R. R. v. Indiana, 194 U. S. 579 6

Union Depot, etc., Co. v. Brunswick, 31 Minn. 297..... .....15, 20, 22

United States v. Holt State Bank, 270 U. S. 49.....17, 23

United States v. Oregon, 295 U. S. 1.....4, 23

United States v. Utah, 283 U. S. 64..... 23

Statutes.

28 U. S. C. 1257 (2) 4

28 U. S. C. 1257 (3) 4

28 U. S. C. 2103 4

Minnesota Laws of 1909, Chapter 49..... .....2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 23

Minnesota Laws of 1917, Chapter 110..... .....2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 23

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Appellants,

vs.

STATE OF MINNESOTA,

Appellee.

APPEAL FROM
THE SUPREME COURT OF THE STATE OF MINNESOTA.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS THE APPEAL AND STATEMENT OPPOSING JURISDICTION OF THIS COURT.

This is a case peculiarly suited to the jurisdiction of this Court. It is a case in which State statutes have been applied by a State court to appropriate to the State itself property rights of Appellants which stemmed from federal conveyances and vested in Appellants' predecessors under established law long before the passage of such State Statutes. The judgment gives direct effect to these statutes.

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The State relied on them throughout the case, and their constitutional validity was sustained. The questions involved are of great public importance. They embrace not only the large property values directly and indirectly in issue but also the integrity of established rules of property in Minnesota and the integrity and effectiveness of the basic protective provisions of our United States Constitution. The circumstances under which this case arose and the result reached have established precedents which, if permitted to stand uncorrected, open an almost unlimited field for legislative appropriation of private rights, property or civil, and the circumvention of all constitutional protections against such appropriations.

Appellee's brief does not even attempt to question the indisputable fact that the only alienable, proprietary rights and uses which the judgment finds to be in the State are those in the "iron ores and other minerals * * * with right to dispose of same by lease," which alone were appropriated to the State by the 1909 and 1917 statutes.* (Statement as to Jurisdiction, pp. 6 to 8; 34 to 37.) Appellee now admits that the constitutionality of such statutes has been properly and adequately raised in this case.

Such facts alone should settle this appeal.

They cannot be nullified by any failure of the State Supreme Court to fully discuss them in its opinion.

Nor can they be nullified by the implication in certain parts of that opinion that it was based on the common law. The common law made no such distinction between the ownership of "iron ores and other minerals" and of the other contents of land; and the District Court clearly based this distinction on the statutes which alone can support it. (Statement as to Jurisdiction, pp. 14 to 16 and 35 to 37.)

Neither does Appellee seriously question that the judgment in this case is in direct conflict with all previous

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* Minnesota Laws of 1909, Chapter 49, and Minnesota Laws of 1917, Chapter 110.

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decisions of the State Supreme Court on the subject, as discussed in our Statement as to Jurisdiction, pp. 21 to 28. Rather Appellee relies on certain unsupported implications to the contrary in the State Supreme Court's opinion and the asserted right of that court to change its established rules of property, under which Appellants' titles vested, if it does not say that it is basing the change on the 1909 and 1917 statutes.

As the soundness of this appeal is so clearly established by the judgment itself, and so fully discussed in Appellants' Statement as to Jurisdiction, this brief will be largely confined to specific comments on Appellee's Statement in Opposition to this Court's Jurisdiction. The titles and sub-titles used herein follow those used by Appellee.

APPELLEE'S "STATEMENT IN SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO THE JURISDICTION OF THIS COURT."

Appellee is correct in the statement here that this Court's jurisdiction is to be determined on the basis of the decision or judgment appealed from. That judgment in the Minnesota Supreme Court simply affirmed the judgment of the District Court. The substance and character of the judgment appealed from is thus established by the judgment of the District Court. The language used by the State Supreme Court in one of its opinions is not the judgment appealed from as most of Appellee's discussion would seek to imply.

Appellee is not correct in the statement that:

> "This Court has jurisdiction *only** if the decision and judgment of the Minnesota court *were based upon* statutes of the State of Minnesota * * *"

with its implication, later developed, that Appellee means, by the expression "were based upon," that the opinion and judgment of the State Supreme Court must state that they "were based upon" the statutes.

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* Emphasis supplied throughout except as otherwise noted.

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Even if this is intended to be confined to the appeal provision of Title 28, United States Code, Section 1257, (2), it is not correct. That provision contains no such implication. It reads:

> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Furthermore, while there would not seem to be the slightest question but that, under the form of the judgment, the pleadings and the facts in this case, this Court has appellate jurisdiction under the foregoing subsection, —such is not the only source of this Court's jurisdiction in this case. Section 2103 expressly provides that, if appropriate, our appeal papers shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to this Court at the time the appeal was taken.

Section 1257, (3), confers jurisdiction upon this Court for review by writ of certiorari,—

> "* * * where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution * * *, or where any title, right, * * *, is specially set up or claimed under the Constitution * * * or statutes of * * *, or authority exercised under, the United States."

It can hardly be questioned here that Appellants' titles have been specially set up or claimed under the Constitution and under the statutes of, and authority exercised under, the United States, both in the pleadings and briefs, as such titles are derived from conveyances from the United States. (Original record in court below, pp. 17-18 *et seq.*; 309-310.) See *United States v. Oregon*, 295 U. S. 1, at page 28, and cases there cited. This Court said in *Shively v. Bowlby*, 152 U. S. 1, at page 9:

> "The judgment against its validity (a grant from the United States and conveyance thereunder) proceeded

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upon the ground that the grant from the United States upon which it was founded passed no title or right, as against the subsequent deeds from the State, in lands below high water mark. This is a direct adjudication against the validity of a right or privilege claimed under a law of the United States, and presents a Federal question within the appellate jurisdiction of this Court. Rev. Stat. § 709. That jurisdiction has been repeatedly exercised, without objection or doubt, in similar cases of writs of error to the State courts. (Citing cases.)"

STATEMENT OF CASE.

Appellee characterizes as "not correct" the following statement of Appellants:

> "This case involves the ownership of the *alienable, proprietary,* beneficial rights and uses in some 33 acres of land in St. Louis County, Minnesota, which had formerly been the bed of a small shallow body of water known as 'Syracuse Lake'." (Statement as to Jurisdiction, p. 2.)

That this is a correct statement of the issues created by the pleadings is fully established by our Statement as to Jurisdiction and confirmed by Appellee's discussion later in its statement.

We admit that it is incorrect as applied to the issue on appeal from the judgment of the District Court. As we repeatedly pointed out in our Statement as to Jurisdiction, that issue involves ownership of the alienable, proprietary, beneficial rights and uses in *only "the iron ores and other minerals."* As to the lands generally and their other content, the judgment denied such proprietary rights to the State and declined to take them from Appellants. The only proprietary rights found to be in the State, and in issue here are thus the rights, and only the rights, which were sought to be appropriated to the State by the 1909 and 1917 statutes here in question. (See Statement as to Jurisdiction, pp. 6 to 8 and 34 to 37.)

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Here also is the erroneous assertion by Appellee that the facts as well as the issues are to be determined from the language of the Minnesota Supreme Court's opinion rather than from the record and the affirmed judgment and findings here appealed from.

STATUTES OF THE STATE CLAIMED TO BE INVOLVED.

The mere assertion by Appellee that the decision is based on the common law and not upon the statutes cited, cannot, any more than can the similar implication in certain of the language used in the State Supreme Court's opinion, determine the jurisdictional questions. (See authorities, Statement as to Jurisdiction, pp. 33 to 34.) In *Terre Haute & Indianapolis R. R. v. Indiana*, 194 U. S. 579, at page 589, Mr. Justice Holmes states:

> "* * * We are of opinion that we cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws, because the state court put forward the untenable construction more than the unconstitutional statutes in its judgment. To hold otherwise would open an easy method of avoiding the jurisdiction of this Court."

Certainly this case would never have been brought except for the passage of the flagrantly unconstitutional statutes here in question.

The well settled principle that this Court will itself determine the existence of rights under the Constitution, and the effect thereon of legislation or other action claimed to impair such rights was applied to the question of ownership of land under navigable waters in *Appleby v. City of New York*, 271 U. S. 364, where Mr. Chief Justice Taft said at page 380:

> "In the case before us, the construction and effect of the contract involved in the deeds and covenants depend chiefly upon the extent of the power of the State

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> and city to part with property under navigable waters to private persons, free from subsequent regulatory control of the water over the land and the land itself. That is a state question, and we must determine it from the law of the state, as it was when the deeds were executed, to be derived from statutes then in force and from the decisions of the state court then and since made; *but we must give our own judgment derived from such sources and not accept the present conclusion of the state court without inquiry.*"

and at page 391:

> "If we are right in our conclusion as to the effect of these deeds under the law of New York at the time of their execution, then there can be no doubt that the laws of 1857 and 1871 as enforced in this case impair the contract made by the city with the grantees of these deeds."

Certainly, also, if, as now asserted by Appellee, the judgment had actually been based upon the ownership by the State "under the common law" of the alienable, proprietary, beneficial rights and uses, the judgment would not have been confined to the "iron ores and other minerals" and the "right to dispose of same by lease."

The common law never made any such distinction. Only the statutes here in question make such distinction.

RAISING THE FEDERAL QUESTIONS AND RULINGS THEREON BY THE COURTS BELOW.

1. The admission here that the federal questions have been sufficiently raised should, when coupled with the inherent nature of the judgment appealed from and its necessary relationship to the statutes involved, finally settle this appeal. The effort of counsel for the State, as well as that indicated by some parts of the State Supreme Court's opinion, to avoid the constitutional issue only serve to emphasize Appellants' need of the constitutional protections here invoked.

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2. It is here asserted that the Complaint is an ordinary one and "there is nothing in the original Complaint to indicate that its claim is based upon those statutes." This is not correct. The Complaint, in both its allegations and prayer, asserts claim to the *"iron ores and other minerals"* in the exact language of the statutes here in issue except for the necessary changes to apply the statutory language to the specific lands claimed.

For the convenience of this Court, the following comparison is given:

Complaint	1909 Statute
The Complaint asserts ownership of	"That
"all iron ores and other minerals on, in or under said lands	*all iron ores and other minerals on, in or under* the *lands* within this state which lie beneath the waters of meandered public lakes and rivers belong to the state,
together with the right to enter upon said lands and explore for and mine and remove such iron ore and other minerals, and has, and ever since the organization of the State of Minnesota	*together with the right to enter upon such lands and explore for and mine and remove such iron ore and other minerals, and* that the state now *has, and since its organization*
has had, the right to sell, lease, or otherwise use or dispose of such lands and such iron ores or other minerals • • •."	*has had, the right to sell, lease, or otherwise use or dispose of such* mineral *lands and such iron ores and other minerals* • • •."

It will be noted that the identity of language extends even to the use of the word "ore" in singular form in one particular place and in the plural form in all other places.

As emphasized heretofore and in our Statement as to Jurisdiction, the judgment of the District Court, affirmed by the State Supreme Court, similarly follows the language of the statute. (Second record in court below, page 52, Statement as to Jurisdiction, pp. 34 to 37.)

3. The bare reiteration here that the District Court's decision was "based upon the common law" and not

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upon the statutes is refuted by not only the inherent provisions of the judgment itself but also many passages in the opinion of the District Court. (See Statement as to Jurisdiction, pp. 14 to 16 and 34 to 37.)

4. Contrast the statement of Appellee here, that the riparian owner's rights involved only "the matter of accretions and relictions, which are wholly a matter of state control," with the repeated assertion in almost every decision of the State Supreme Court (other than in this case) and down to the present day, that the rights of the riparian owners "are vested property rights which cannot be taken away even by the state for public use, without compensation." (See Minnesota cases referred to in Statement as to Jurisdiction, pp. 22 to 25.)

5. Appellee's effort here to establish by quotations from the State Supreme Court's opinion that the judgment here appealed from did not draw into question the 1909 and 1917 statutes wholly ignores, as heretofore pointed out, the inherent nature of that judgment which cannot be controlled or changed by such language. (*Supra*, pp. 5 to 7 and Statement as to Jurisdiction, pp. 33 to 34.)

There is not, as heretofore pointed out, the slightest basis (and none is even suggested) for a "construction of the common law" which places in the State the alienable, proprietary rights and uses in *only the "iron ores and other minerals"* while denying to the State such rights and uses in the other contents of the land. *No such distinction ever existed at common law. It is made only by the 1909 statute.*

The judgment here appealed from characterized the State's rights generally as held "*in its sovereign, governmental capacity, for common public use* and in trust for the people of the state *for the public purpose for which it is adapted, but not in absolute proprietorship with right of alienation* * * *." (Second record in court below, page

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52.) This is the limitation which, except for this case, the Minnesota courts have always applied to all rights of the State in these lake bed lands. It is departed from in this case only, and *only with respect to "the iron ores and other minerals."* With respect to these "iron ores and other minerals," the judgment attempts to vest in the State the *proprietary right* to use them and dispose of them by lease. This accords only with the 1909 and 1917 statutes. It does not accord with any known or suggested distinction in the common law.

We believe that the State Supreme Court was wholly mistaken in those parts of its opinion here quoted to the effect that, because the State had sovereignty over the navigable waters of the State and their beds from the date of its organization, riparian owners could enjoy rights in such beds only through formal grant from the state legislature. This Court has consistently reiterated the basic principle specifically applied to Minnesota in *St. Anthony Falls Water Power Co. v. Board*, 168 U. S. 349, 358, that the rights of riparian owners in that State "are to be measured by the rules and decisions of the state courts in Minnesota." It has also confirmed, as recently as in the California Tide-Lands case, that the mere existence of sovereignty or governmental rights in a state does not carry proprietary rights. (See Statement as to Jurisdiction, pp. 46 to 47 and 45 to 46.) A state also has sovereignty over its land areas. The extent of that sovereignty is to be found in the common law as defined and applied by the courts with such statutory modifications as do not unconstitutionally impinge upon vested rights.

While the State Supreme Court may be technically correct in the language here quoted from its opinion to the effect that the state legislature had made no *"grant* vesting these shore owners with any interest in the portion of the lake bed involved," it is wholly incorrect in the inference that the state legislature had not fully recognized

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(except for the 1909 and related statutes) the ownership by riparian owners of all alienable, proprietary and beneficial rights in the lake beds in accordance with the State Supreme Court's repeated construction of the common law and of full title whenever such beds were properly freed of the burden of the public waters through either authorized artificial drainage or loss of navigability from natural causes. (Statement as to Jurisdiction, p. 27 to 28 and Appendix A thereto.)

The mere assertion by counsel for Appellee, like similar inferences in the State Court's opinion, cannot change the fact that under the law in Minnesota as announced by all decisions of its Supreme Court, except in this case, the conveyances to Appellants and their predecessors in interest duly vested in them the alienable, proprietary and beneficial rights and uses in and to the iron ores and other minerals in the lands here in question as well as in and to the other contents thereof, and Appellants were left free to fully exercise such rights when the waters were duly removed under authority of both the state and federal governments. (Statement as to Jurisdiction, pp. 22 to 26 and 27 to 28.) Appellee does not really seriously attempt to claim the contrary.

6. The real basis upon which the State as Appellee seeks in this motion, and has sought through this case, to deprive Appellants of the benefit of their constitutional guaranties, is made clear here and in subsequent sections by the assertion of the right of the state court to change its definition of the common law property rights in Minnesota "iron ores and other minerals" as long as in doing so it does not admit that its action is based upon the 1909 and related statutes.

As heretofore discussed, the principle advanced by Appellee is subject to the uncontroverted modifying principle established by the decisions of this Court that this Court will make its own examination of the law in Minnesota, its

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own determination of property rights vested under it, and its own determination as to whether or not, in the court's denial of such property rights, the constitutional validity of the 1909 and 1917 statutes has been "drawn in question" by the judgment appealed from.

Furthermore, we know of no case in which it has yet been held by this Court that the courts of a state may, with constitutional immunity, by a change in its common law definitions of property rights, appropriate *to the state itself* property rights which have theretofore clearly vested through conveyances and the established law as theretofore set out by the decisions of the courts of such state.

For example: Minnesota also had sovereignty over the land areas within that State from the time of its organization. Under the decisions of its courts, conveyances of such areas by the United States and others, when in proper form, carry so-called fee title. Such fee title is of course, however, subject to the sovereign rights of the State. If the State should today assert ownership of the "iron ores and other minerals" in and under such land areas, and that it "has, and ever since the organization of the state has had, the right to sell, lease or otherwise use or dispose of such iron ores or other minerals" as a common law incident to its sovereign rights over such land areas, and if the State Supreme Court should sustain such contention and announce that such had always been the common law of the State of Minnesota, would the private owners of such "iron ores and other minerals," be without the protective jusisdiction of this Court? We do not believe that this would be so even if such result were attempted by the State without the enactment by its legislature of any confiscating statute to which certain of such constitutional provisions could be specifically applied.

Certainly there would be no doubt whatsoever if the land owners had acquired their titles, as did the Appellants in this case, by conveyances from the United States,

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since the rights or titles involved would have been "specially set up or claimed under the Constitution * * * or statutes of * * * or authority exercised under, the United States." (See *supra*, pp. 4-5.)

Viewing our basic question here from another aspect: If the 1909 and 1917 statutes had not been passed by the state legislature, no State official would have presumed to start this action. The analysis of the Complaint in this case given above clearly shows that this action was filed only because of, and in support of, the 1909 and 1917 confiscatory statutes. True, there was added in the Complaint the claim of full fee title to the other contents of the land as well as to the "iron ores and other minerals," and that claim cannot be said to be supported by the 1909 and 1917 statutes. But that claim was rejected by the court below. Its mere unsustained insertion in the Complaint should not now be availed of to deprive Appellants of their constitutional protections.

7. We do not agree that it must "appear affirmatively" from the State Supreme Court's opinion that the federal question was necessary to the determination of this case. The cases cited by Appellee do not so hold. This Court has repeatedly held, as heretofore emphasized, that it will make its own determination of such matters. (See Statement as to Jurisdiction, pp. 33 to 34, and *supra*, pp. 6-7.)

That the constitutional validity of the 1909 and 1917 statutes has been drawn in question in this case is admitted. That their constitutional validity was sustained, and that they and the federal questions involved in them were essential to the judgment here appealed from, are fully established by the substance of the judgment itself and the opinions of the District Court which rendered it.

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STATEMENT OF GROUNDS UPON WHICH IT IS CONTENDED THAT THE QUESTIONS INVOLVED ARE SUBSTANTIAL.

Here is a reiteration of the claim that the Minnesota Court can, with constitutional impunity, overrule all of its prior decisions, even though by so doing it appropriates to the State the principal elements of value in Appellants' property, so long as it does not formally base its action on the 1909 and 1917 statutes.

As heretofore pointed out:

(a) The judgment here appealed from directly followed the statutes;

(b) The District Court clearly based its findings on the statutes;

(c) The effort in the State Supreme Court's opinion to make it appear that it was only asserting general common law rules and not giving effect to the statutes is clearly inconsistent with the inherent nature of the judgment itself and is not supported by any common law distinction between the ownership of "iron ores and other minerals," and of other contents of land;

(d) This Court will settle these questions for itself.

We have difficulty in understanding what could have prompted counsel for the State to here make the flat assertion that no Minnesota case holds that a riparian owner "has any alienable or proprietary right in the bed of a navigable lake below low-water mark, or any beneficial rights or uses beyond the ordinary riparian rights * * *," such as exist at common law even on tide water. Every decision of the Minnesota Supreme Court, except in this case, is to the contrary. (Statement as to Jurisdiction, pp. 22 to 28.)

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Some of the cases do mention wharfage, dockage rights and rights of accretion and reliction but they go on also to confine the State's rights to only inalienable, governmental rights for protection of the public use of the waters for the purposes for which they are adapted, and place all other rights in the riparian owners. Only the *jus publicum* is in the state. All of the *jus privatum* is in the lot owner. As early as the case of *Morrill v. St. Anthony Falls Water Power Co.*, 26 Minn. 222, the Minnesota Supreme Court, in discussing the reciprocal completeness of the State's governmental right on the one hand and the private rights of the lot owner on the other, used the following language to be found again in various later cases:

> "The limit to the *private* right is imposed by the *public* right, and the *private* right exists up to the point beyond which it would be inconsistent with the *public* right."

The distinction is illustrated in *Lamprey v. State*, 52 Minn. 181, where it is stated at page 202:

> "• • • *We have repudiated the doctrine that the state has any private or proprietary right* (as had the king) in navigable waters, but that it holds them in its sovereign capacity, as trustee for the people, for public use."

In *Union Depot v. Brunswick*, 31 Minn. 297, at page 302:

> "Whether the fee in this 'made land' would be in the state or in the riparian owner—that is, whether it partakes of the nature of the bed of the stream upon which it is made, or of the shore to which it is added—may be a question of speculative interest, but it is not one of any practical importance. If the fee be in the riparian owner, yet, of course, it must be a qualified fee; that is, subject to the paramount right of public navigation. *But if it be in the state, the riparian owner still has, subject to this same public right, the exclu-*

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sive right of possession and the entire beneficial interest."

In *Miller v. Mendenhall*, 43 Minn. 95, at page 96:

"• • • While the *public* right of navigation and fishery may not be extinguished until the waters are excluded, yet *after the submerged land is filled or occupied* the riparian owner will have the *exclusive right of possession, and the entire beneficial interests*; and whether this dominion would be absolute and his title indefeasible as against the state, is not necessary to inquire."

Furthermore, the numerous decisions involving lake-bed lands which had been relieved from the burden of the governmental rights by either natural causes or the authorized drainage or diversion of the navigable waters did not, of course, turn on such wharfage, dockage and incidental rights. In those decisions the sometimes confusing conflict between the governmental rights of the State and the private rights of the lot owners is eliminated and the decision that all alienable and proprietary rights are vested in the lot owners stands clear-cut and indisputable. These decisions are, of course, controlling here where, before this case was started, the public waters had been diverted with the State's governmental approval and its governmental rights had shifted with them to their new bed and channel which had been duly dedicated for public use.

Most of the actual decisions or holdings of the various Minnesota cases here discussed by Appellee are accurately covered in Appellants' Statement as to Jurisdiction at pages 27 to 28. Our statement as to what they *hold*, what they are a precedent for, does not seem to be questioned by Appellee. Its selection of isolated quotations from them is more confusing than helpful. These quotations should be read only in their context. The comments on certain of these cases taken from the opinion of the State Supreme Court in this case are also not consistent

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with their holdings, as pointed out in Appellants' Statement as to Jurisdiction. (See particularly Appendix B thereto.)

In this connection this Court is particularly urged to consider the sound review of the Minnesota decisions made by Judge Morris in *Hobart v. Hall*, 174 Federal 433 (affirmed 186 Fed. 426), and its own conclusion as to the Minnesota rule set forth in *U. S. v. Holt State Bank*, 270 U. S. 49, 59.

Appellee's quotation from this Court's decision in the *Schurmeier* case, 7 Wall. 272, 287, is immediately followed in the text by the following:

> "Grants of land bounded on rivers above tide-water, says Chancellor Kent, carry the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river, and the public, in cases where the river is navigable for boats and rafts, have an easement therein, or a right of passage, subject to the *jus publicum*, as a public highway.
>
> "The views of that commentator are, that it would require an express exception in the grant, or some clear and unequivocal declaration, or certain and immemorial usage, to limit the title of the riparian owner to the edge of the river, because, as the commentator insists, the stream, when used in a grant as a boundary, is used as an entirety to the centre of it, and he consequently holds that the fee passed to that extent. *Decided cases of the highest authority affirm that doctrine, and it must, doubtless, be deemed correct in most or all jurisdictions where the rules of the common law prevail, as understood in the parent country.*"

The Minnesota courts early adopted the English common law on this and other subjects generally. *Schurmeier v. St. Paul & Pacific R. R. Co.*, 10 Minn. 59 (1865); *State v. Pulle*, 12 Minn. 164 (1866); *Blackman v. Wheaton*, 13 Minn. 33 (1868).

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This Court's opinion in the *Schurmeier* case was largely devoted to a discussion of the old federal statutes with reference to surveys, boundaries, meander lines, etc., rather than the principles here involved which determine the rights of riparian owners in the beds of navigable waters after they had been freed of the public burdens of such waters, so that there was for a year or two afterwards some confusion as to this Court's views. But such confusion was promptly dissipated. This Court had in the *Schurmeier* case specifically affirmed the title of the lot owners to the area in the bed of the Mississippi River which had been freed of the burden of the public waters by fill, and did specifically hold that the boundary of the lot owners on navigable waters *is such waters and not any meander line*,—the meander line being only a convenience for measuring acreage in connection with sales of the lots under the federal statutes.

In *St. Paul S. & T. F. R. Co. v. First Division, etc. R. Co.*, 26 Minn. 31, next cited by Appellee, the court commented on the *Schurmeier* case in the following language:

> "This Court, in *Schurmeier v. St. Paul & Pacific R. Co.*, 10 Minn. 59 (82), decided that the meander lines of governmental subdivisions, bordering on navigable rivers, do not limit the grant in a patent; and this decision was affirmed by the Supreme Court of the United States in the same case, *Railroad Co. v. Schurmeier*, 7 Wall. 272. The question is therefore set at rest. *In the same case, this Court held that the common-law rule as to construction of grants of land bordering on streams is in force in this state, and is applicable to patents or grants of the public lands by the general government.* But patents and grants by the general government may be controlled in this respect, as in others, by the acts of congress regulating the survey and sale of public lands."

Morrill v. St. Anthony Water Falls Power Co., 26 Minn. 222, involved the use of the waters, not title to the

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river bed, but the court approved the rule above quoted from *St. Paul S. & T. F. R. Co. v. First Division, etc., R. Co., supra.*

The attempt of Appellee to distinguish the case of *Miller v. Mendenhall,* 43 Minn. 95, and the associated Duluth Harbor cases on the ground that by fixing the harbor line at the point of navigability "the state had actually made a grant to the riparian owners" of the bed between that line and the shore, is most interesting.

Such decisions did not so hold but only held that the fixing of such a line was an invitation to the shore owners to freely exercise the rights which they already had, because it relieved such rights from certain obligations of the paramount government right to control navigation.

The holdings in these cases were discussed at length by the State Supreme Court in 1942 in its decision in *Nelson v. Delong,* 213 Minn. 425. See particularly its discussion starting at page 432 and its quotation with approval from Justice Mitchell's opinion in *Bradshaw v. Duluth Imperial Mill Co.,* 52 Minn. 64, where it was stated:

> "• • • *But the establishment of a dock line neither creates nor destroys rights, but merely regulates and limits the exercise of existing rights. Plaintiff's rights of property in the lots in question were not divested by either the location or change of location of the dock line.*• So long as the old line remained in force, of course he could not use the lots for any purpose inconsistent with the right of navigation in the waters over them. But when the line was changed, this limitation was removed, and the establishment of the new line was authority, as well as an invitation to him from the state, to fill and build out to that line, or so far in that direction as his property extended."

Even if, however, Appellee's contention be accepted, that the fixing of a harbor line constituted "a grant from the legislature to the lot owner," it could hardly be said

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• Emphasis supplied by Minnesota Supreme Court.

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that the fixing of the harbor line in these Duluth cases constituted more of a grant to the shore owner by the State than had occurred in connection with the lands involved in this appeal where the State had authorized and carried out *the complete removal and diversion of the waters.*

Appellee's effort to distinguish *Union Depot, etc., Co. v. Brunswick,* 31 Minn. 297, on the basis that it involved water bed land on which "made land" had been placed, is also most interesting, as applied to our case.

We can see no possible valid distinction between a situation where the State, acting in its governmental capacity, properly permits the navigable waters to be removed from the land by dumping material on the bed and one where it permits the complete removal of the waters by a duly authorized diversion of them to a new channel dedicated to public use. If any such distinction can be said to exist, it should be noted that prior to the commencement of this case, and with due State authorization, not only had the waters been fully diverted but also a part of the bed of Syracuse Lake had been filled by stripping dumps and other parts had been deeply excavated.

The actual result of all of the State decisions is, of course, that when in the due exercise of the governmental rights of the State, or through natural causes, the lands have been freed of the burden of the governmental rights and trust for the protection of the public use of the waters for the purpose for which they are adapted, the lot owner is left free to fully enjoy his alienable, proprietary, beneficial rights and uses.

Appellants' quotations from *Petraborg v. Zontelli,* 217 Minn. 536, and *Carpenter v. Board of Commissioners,* 56 Minn. 515, are from cases which involved respectively an injunction against, and damages for, an interference with waters without the consent of the riparian owners. The discussion is thus naturally of the rights in the waters rather than in the beds.

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Appellee's citation of *State v. St. Paul and Duluth R. Co.*, 81 Minn. 422 (1900) is of particular interest as recording that the State and local governmental units tax the submerged lands under navigable waters,—to the lot owners if they have not been separated by conveyance from him, and otherwise to the holder thereof by deed. The State Supreme Court said at page 424:

> "Riparian rights, though recognized by the law of this state as property rights subject to sale and transfer by the owner of the adjoining or shore property, are, until separated and disassociated therefrom by some act of such owner, an incident to and part of the abutting shore property, having no separate and independent existence. *For all purposes*, taxing and otherwise, *the shore property and the submerged land constitute but one tract or parcel of land*; and, as the abutting shore property is the superior or paramount estate, *the submerged land* and all riparian rights are necessarily included therein, and inseparable therefrom, except by some act of the owner indicating an intention to sever them.
>
> "Counsel for the state does not controvert this proposition, and he concedes that if the shore property was owned by an individual, *a tax thereon would include and cover all riparian rights.* But he contends that, as the shore property is exempt from taxation because used for railroad purposes, and *as the submerged land is not used in connection therewith, or for any purposes whatever, it is taxable as other real property owned by railroad companies* which is not used for railroad purposes. This contention is based on the theory that, inasmuch as the owner of the shore estate may sever and separate therefrom the submerged land and riparian rights incident thereto, and sell and dispose of the same to one having no interest in the shore property, such submerged land is severable without the consent of or action by the shore owner, and was properly platted by the county auditor as separate and independent property."

Appellee's statement that in no decision of the Minnesota court, except in *State v. Korrer*, 127 Minn. 60, "has

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there been directly involved the question of rights of the state in the beds of its navigable waters, and in no other case has the state been a party," is not correct. Such question was involved in, and the State was a party to, *State v. St. Paul & Duluth R. Co.*, 81 Minn. 422, discussed hereinbefore. The State's rights were also directly involved in *Union Depot, etc., Co. v. Brunswick*, 31 Minn. 297. There the State by special act of its legislature had granted to the Depot Company "all of the rights belonging to the State of Minnesota to and in the soil under said Lake St. Croix so to be occupied by said railroad bed and structures * * *." Such a grant was held by the court to be without effect *because the State had no alienable, proprietary rights to grant.*

The State was also a direct party to *Lamprey v. State*, 52 Minn. 181, in which riparian owners on a navigable lake brought an action, after the lake had dried up, asking that the State, as a defendant, be declared to have no title or interest in the dried up lake bed. The decision was in favor of plaintiffs, the court stating at page 200:

> "When the waters of any of them have so far receded or dried up as to be no longer capable of any beneficial use by the public, they are no longer public waters, *and their former beds*, under the principles already announced, *would become the private property of the riparian owners.*"

The State's rights were also directly involved in *Hobart v. Hall*, 174 Fed. 433 (affirmed 186 Fed. 426), which dealt with the question of title to an island which had formed in the Mississippi River between a lot owned by plaintiff on the east bank of the river and the middle or thread of the stream. The island (an acre and one half in extent) had been formed after plaintiff's predecessor had received title to his lot. Defendants claimed title through a deed given by the State of Minnesota. It was held that plaintiff was "the beneficial owner and entitled to the im-

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mediate and exclusive possession and use" of all of that part of the island between his lot and the thread of the stream, subject only to any sovereign or governmental rights of the State, "for the purpose of protecting, preserving and improving the public right of navigation on said river."

Furthermore, while the State has not been a party to the many other decisions, it has recognized their import and effect in its drainage ditch and other legislation (See Appendix A to Statement as to Jurisdiction) and, throughout the ninety odd years of its existence, has attempted to question such holdings only through the *Korrer* case which was brought after the 1909 statute and decided against the State in 1914, and finally in this case brought after the legislature had continued its effort to appropriate the lake-bed "iron ores and other minerals" to the State by the passage of the 1917 and subsequent leasing statutes.

Finally, the State claims that Appellants are not unconstitutionally deprived of their property, and no federal question is presented, because several Minnesota cases held that leasing of ore in state lands was not a sale of the lands themselves. No serious claim is made that a state lease of the "iron ores and other minerals" in land is not an alienation of such "iron ores and other minerals," and the judgment which is the subject of this appeal expressly found with respect to the "iron ores and other minerals," that the State could "*dispose* of same by lease." (Second record in court below, page 52). But in any case, the issue can no more be avoided by a finding that the leasing of the right to mine and remove the "iron ores and other minerals" is not a State alienation of private rights than could the issues as to the federal questions be avoided by a declaration or finding that non-navigable waters were navigable. *United States v. Oregon,* 295 U. S. 1, 29; *Oklahoma v. Texas,* 258 U. S. 574; *United States v. Utah,* 283 U. S. 64, 75; *United States v. Holt State Bank,* 270 U. S. 49, 55, 56.

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While it must be admitted that there have been tendencies in certain parts of this country toward the adoption of foreign ideologies, particularly as applied to the ownership of minerals and similar natural resources in which the majority of the public does not participate, such tendencies are being increasingly repudiated with a rising understanding and analysis of the soundness of our institutions. The constitutional provisions here invoked by Appellants were carefully designed to prevent inroads on private rights by government, whether royal or democractic. As long as they remain in the Constitution, the recognized procedures for their application and determination by this Court should be sought by the State, not avoided.

We respectfully submit that the State's motion for the dismissal of this appeal should be denied.

Respectfully submitted,

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MAY 3 1949
CHARLES ELMORE CROPL
CLER

In the Supreme Court of the United States

OCTOBER TERM 1948.

No. 649.

LONGYEAR HOLDING COMPANY, a Corporation, HELEN H. BENNETT, C. M. HILL LUMBER COMPANY, a Corporation, THE ADAMS CORPORATION, a Corporation, HAROLD W. McCORMACK, JOHN ANDREW PETERSON, FANNIE E. DANIELS, ANNIE E. DANIELS, MINNIE DANIELS MANN, JENNIE D. CAMP, ANN R. HESS, WILLIAM R. DANIELS, LANCAS IRON COMPANY, a Corporation, THE NORTH STAR IRON COMPANY OF WEST VIRGINIA, a Corporation, SAGINAW LAND COMPANY, a Corporation, HELEN EMERSON JAMISON, FRANCES SELLWOOD LUSTER, R. M. SELLWOOD, JR., and JOSEPH GERALD SELLWOOD,

Appellants,

vs.

STATE OF MINNESOTA,

Appellee.

APPEAL FROM
THE SUPREME COURT OF THE STATE OF MINNESOTA.

PETITION FOR REHEARING.

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INDEX.

Petition for Rehearing 1

Argument 3

Certificate 7

TABLE OF AUTHORITIES.

Cases.

Dartmouth College case, 17 U. S. 518 5

Murray v. Charleston, 96 U. S. 432 4

Statute.

Title 28, United States Code, Section 1257..... 1

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APPEAL FROM
THE SUPREME COURT OF THE STATE OF MINNESOTA.

PETITION FOR REHEARING.

To *The Honorable Fred M. Vinson,*
Chief Justice of the United States,
and the Associate Justices of the
Supreme Court of the United States:

Come now the above named petitioners (sometimes hereinafter called "appellants") and present their petition for a rehearing in this case on the following grounds:

I.

There is drawn in question herein the validity of State statutes under the Constitution of the United States and the decision of the Supreme Court of Minnesota was in

favor of their validity. The case, thus involving substantial Federal questions, comes precisely within the provisions of Title 28, United States Code, Section 1257, governing appeals to this Court.

II.

This case is of tremendous public importance. The basic question involved is the right of a State to appropriate private property through acts of its legislature without compensation to the owners of that property. The provisions of the United States Constitution here invoked were specifically calculated and adopted to prevent such action. They constitute the only protection the citizens of this Country have against such action. Under our existing governmental organization, the enforcement of such provisions rests primarily upon this Court. The citizens of this Country must look to this Court for such protection. This is exactly the sort of case which historically has been the subject of this Court's jurisdiction. It is a case which cannot be by-passed by this Court without substantially weakening the effectiveness of such vitally important constitutional limitations and public confidence in our form of government and our written Constitution.

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ARGUMENT.

In asking the Court to reconsider its order of April 18, 1949, dismissing the within appeal for want of jurisdiction, we shall not presume to reargue the existence of the substantial Federal Constitutional questions here involved. We believe that the presence of such questions in this litigation and on this appeal is established beyond peradventure in the Statement as to Jurisdiction and in the appellants' brief in opposition to the appellee's motion to dismiss this appeal to which the Court has already devoted its attention. As we see it, the issue now, to borrow a phrase from Burke's Conciliation speech, "is not what a lawyer tells you you *may* do; but what humanity, reason and justice, tell you you *ought* to do." With this in mind, we submit that the decision of the Supreme Court of Minnesota here appealed from, giving, as it does, legal efficacy to Minnesota Statutes, which presume to appropriate without compensation many millions of dollars worth of "iron ores and other minerals" lying beneath lakes and rivers in the State of Minnesota and owned by private citizens of that State, and which impair the obligations of private contracts, amply justifies this final appeal to the conscience of this Court. In thus appealing,—

> We are not unmindful that any case which reaches the threshold of this Court readily assumes in the minds of counsel for the appellant, sometimes justifiably but oftentimes without justification, the proportions of a *cause celebre*;
>
> We are not unmindful that the orders of many new Federal administrative agencies promulgated during the last decade and the enactment of a great body of Federal legislation during and since the Second World War, reaching matters which had theretofore been thought to be the subject of local law, have imposed upon this Court unprecedented burdens; and

We are not unmindful that during the present term of this Court more than seven hundred cases* have been docketed therein, and that of the five hundred and ninety-four cases so docketed, which had been passed upon by this Court through April 18, 1949, one hundred and ninety** cases have been accepted by this Court for disposition on their merits.

On the other hand, this Court since the genesis of the Nation has been unequivocally committed to the proposition that "there is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts (*a fortiori* laws appropriating private property without compensation) and *it is one of the highest duties of this Court to take care the prohibition shall neither be evaded nor frittered away.*" *Murray v. Charleston*, 96 U. S. 432, 448.†

Although devotion to that duty may sometimes entail difficulties, such difficulties may never be allowed to impeach the obligations which the Constitution itself and this Court's own mandates have imposed upon the Court.

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* Statistics used herein have been compiled from Commerce Clearing House Supreme Court Service.

** Of such 190 cases, 56 appear to have involved substantial constitutional questions, of which 38 involved civil rights arising in criminal cases or otherwise, 7 involved questions of State taxation, 5 involved questions of administrative law, 3 involved labor relations questions, 2 involved matters of Federal procedure, and 1 involved the faith to be accorded a State decree in a divorce case. Not one appeared to involve enforcement of the basic constitutional injunctions for the protection of private property which are at issue in this case,—except possibly in a collateral way in certain of the State tax cases. It would thus appear that this Court has recently been most zealous in its consideration of cases for the protection of civil and personal rights. Query: Is it not equally in the public interest that its equally important obligation to protect basic rights of private property shall not be left entirely to State and lower courts?

† Emphasis supplied.

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Thus, in the *Dartmouth College* case, 17 U. S. 518, 572, Mr. Justice Story, in his concurring opinion, said:

> "In pronouncing this judgment, it has not for one moment escaped me how delicate, difficult, and ungracious is the task devolved upon us. The predicament in which this Court stands in relation to the nation at large, is full of perplexities and embarrassments. It is called to decide on causes between citizens of different States, between a State and its citizens, and between different States. It stands, therefore, in the midst of jealousies and rivalries of conflicting parties, with the most momentous interests confided to its care. Under such circumstances, it never can have a motive to do more than its duty; and, I trust, it will always be found to possess firmness enough to do that."

The grave constitutional questions involved in the instant case clearly invoke that duty and eloquently command the firmness to discharge it. Were this not so, the way would be left open to a State, accountable to no one and to no restraint save its own fiat, to evade the supreme ordinances of the Nation and to fritter away the rights and liberties of individual citizens which those ordinances are designed to secure. That this must not happen has been repeatedly stated by this Court, in times of general public confidence in our basic institutions and private property rights. Our present times are affected by foreign ideologies which seem to invite trespass upon property rights not only by administrative bodies imbued with a desire to regulate but also by legislatures in quest of revenues they can disburse. These are times which call more loudly and urgently than ever before not only for actual protection, but also for public confidence in the effective protection, of private property rights upon which our American institutions and the economic stability of this country depend.

In these times, and in a situation such as the case at bar where State laws which in form and substance appropriate private property to the State itself have been approved by a State Court, it is especially and peculiarly

important that this Court accept and exercise its often recognized responsibility for these "momentous interests confided to its care." Neither the important rights of the appellants nor public confidence in our existing institutions (which has already been impaired by constant attacks from both the right and the left), can be fairly met without a full consideration of the vital issues in this case. In the pattern of our political institutions where the power of the State is limited by a written Constitution, this Court alone, as the final arbiter of constitutional principles, stands between the individual citizen and the overzealous legislature.

WHEREFORE, petitioners pray that this Court grant a rehearing in this case and that an order be entered vacating and setting aside the order to dismiss entered by this Court on April 18, 1949, and noting probable jurisdiction herein.

Respectfully submitted,

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Certificate.

I, John B. Putnam, one of the counsel for the above named petitioners, do hereby certify that the foregoing petition for a rehearing of this case is presented in good faith and not for delay.

JOHN B. PUTNAM.

No. 649. LONGYEAR HOLDING CO. ET AL. *v.* MINNESOTA. Appeal from the Supreme Court of Minnesota. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by 28 U. S. C. § 2103, certiorari is denied. MR. JUSTICE BURTON took no part in the consideration or decision of this case. *John B. Putnam, Pierce Butler* and *John A. Hadden* for appellants. *J. A. A. Burnquist,* Attorney General of Minnesota, *George B. Sjoselius,* Deputy Attorney General, and *Wm. C. Green* for appellee. Reported below: 227 Minn. 255, 35 N. W. 2d 291.

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